



**FACULTEIT RECHTSGELEERDHEID
VAKGROEP GRONDSLAGEN EN GESCHIEDENIS VAN HET RECHT**

**IMF SUPPORTED ECONOMIC REFORMS AND CONSTITUTIONAL COURT CASE LAW:
AN EMPIRICAL ASSESSMENT COLOMBIA 2000-2006**

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LIST OF ACRONYMS¹

Action of Protection of Fundamental Rights	APFR
Administrative Code (<i>Código Contencioso Administrativo</i>)	CCA
Administrative Department of Security (<i>Departamento Administrativo de Seguridad</i>)	DAS
Annual Budget Law	ABL
Annual Payment Program (<i>Plan Anual de Caja</i>)	PAC
Asian Development Bank	ADB
Central Public Sector	CPS
Central Unity of Workers (<i>Central Unitaria de Trabajadores</i>)	CUT
Colombian peso	COP
Colombian Association of Health Promotion Enterprises	ACEMI
Colombian Federation of Insurance Agents (<i>Federación Colombiana de Aseguradores</i>)	FASECOLDA
Colombian Institute of Credit and Foreign Technical Studies	ICETEX
Colombian Institute of Saving and Housing (<i>Instituto Colombiano de Ahorro y Vivienda</i>)	ICAV
Colombian Institute for Rural Development (<i>Instituto Colombiano de Desarrollo Rural</i>)	INCODER
Colombian Institute of Tax Law (<i>Instituto Colombiano de Derecho Tributario ICDT</i>)	CITL
Colombian Oil (Petroleum) Company (<i>Empresa Colombiana de Petróleos</i>)	ECOPETROL
Colombian Family Welfare Institute (<i>Instituto Colombiano de Bienestar Familiar</i>)	ICBF
Commercial and Industrial Corporations (<i>Empresas Comerciales e Industriales del Estado</i>)	ECIE
Concurring Vote	CV
Constitutional Amendment (<i>Acto Legislativo</i>)	AL
Council for Economic and Social Policy (<i>Consejo de Política Económica y Social</i>)	CONPES
Critical Legal Studies Movement	CLSM
Essential Contested Concepts	ECC's
IMF Staff Country Reports	C.R.
Decree	D
Deposit Insurance Fund (Fondo de Garantías de Instituciones Financieras)	FOGAFIN
Directorate of National Taxes and Customs	DIAN
Dissenting Vote	D.V.
Economic Analysis of the Law	EAL
Economic Commission for Latin America (<i>Comisión económica para América Latina – CEPAL</i>)	ECLA
Economic, social and cultural rights	ESC
Enhanced Structural Adjustment Facility	ESAF
European Union	EU
Extended Fund Facility	EFF
Fiscal Affairs Department of IMF	FAD
Fiscal Transparency Report on Standards and Codes	ROSC
Financial Transaction Tax	FTT
Financial System Stability Assessment (IMF board Document)	FSSA
Financial Sector Assessment Program of the IMF	FSAP
Fiscal Affairs Department of IMF	FAD

¹ Spanish acronyms are used because of its general identification in Colombia

Foreign Direct Investment	FDI
Health Promotion Enterprises (<i>Empresas Promotoras de Salud</i>)	EPS
High School (University) of Public Administration (<i>Escuela Superior de Administración Pública</i>)	ESAP
Human Development Index	HDI
Gross Domestic Product	GDP
Health Sector Hospitals (<i>Instituciones Prestadoras de Salud</i>)	IPS
Inhibited	IN
Inter-American Development Bank	IDB
Intergovernmental transfers (<i>Sistema General de Participaciones</i>)	SGP
International Convention on Civil and Political Rights	ICCPR
International Covenant on Economic Social and Cultural Rights	ICESCR
International Financial Institutions	IFI
International Labor Organization (<i>Organización Internacional del Trabajo</i>)	ILO
International Monetary Fund (<i>Fondo Monetario Internacional</i>)	IMF
International Society for Equity in Health	ISEQH
Judicial Independence	JI
Letter of Intent	LOI
Memorandum on Economic and Financial Policies	MEFP
Mixed Corporations (<i>Sociedades de Economía Mixta</i>)	SEM
Minimum Legal Wage (<i>Salario Mínimo Legal</i>)	MLW
Monetary and Financial Systems Department of IMF	MFD
National Association of Industrials (<i>Asociación Nacional de Industriales</i>)	ANDI
National Development Plan	NDP
National Planning Department (<i>Departamento Nacional de Planeación</i>)	DNP
National Council of Economic and Social Policies	CONPES
National Council of Fiscal Policy	CONFIS
National Council of the System of Social Security in Health	CNSSSS
National Federations of Merchants (<i>Federación Nacional de Comerciantes</i>)	FENALCO
National Institute of Social Interest, Housing and Urban Reform (<i>Instituto Nacional para la Vivienda de Interés Social y la Reforma Urbana</i>)	INURBE
Non-Financial Public Sector	NFPS
Obligatory Health Plan (<i>Plan Obligatorio de Salud</i>)	POS
Obligatory Health Plan of the Subsidized System (<i>Plan Obligatorio de Salud del Régimen Subsidiado</i>).	POSS
Organization of American States	OAS
Organization for Economic Cooperation and Development	OECD
Organic Budget Law	OBL
Pan American Health Organization	PAHO
Payment Unit per Capita (<i>Unidad de Pago per Cápita</i>)	UPC
Political Constitution of 1991	P.C.
Poverty Reduction and Growth Facility	PRGF
Power Generation and Commercialization Company	ISAGEN ESP
Power Transmission Company (<i>Interconexión Eléctrica</i>)	ISA
Public Solidarity Fund (<i>Fondo de Solidaridad y Garantía del Sistema de Seguridad Social</i>)	FOSYGA

<i>en Salud)</i>	
Public Utilities Corporations (<i>Empresas de Servicios Públicos Domiciliarios</i>)	ESP
Real Value Unit (<i>Unidad de Valor Real</i>)	UVR
<i>Res Judicata</i>	R.J.
Revenue Sharing System, former Intergovernmental transfers (Sistema General de Participaciones).	SGP
Economic Analysis of the Law	EAL
Social Enterprises of the State (<i>Empresas Sociales del Estado</i>)	ESE
Social Security Institute (<i>Instituto de Seguros Sociales</i>)	ISS
Stand By Arrangement	SBA
Statutory Law of States of Exception (<i>Ley Estatutaria de los Estados de Excepción</i>)	SLSE
Statutory Law of Justice Administration (<i>Ley Estatutaria de Administración de Justicia</i>)	SLJA
Structural Adjustment Arrangement	SAA
Structural Adjustment Facility	SAF
Subsidized Regime of the Administrating Enterprises (<i>Administradoras del regimen subsidiado</i>)	ARS
Technical Memorandum of Understanding	TMU
Territorial Health Enterprise (<i>Empresa Territorial de la Salud</i>)	ETESA
United Nations Security Council	UNSC
United Nations Development Program	UNDP
Universal Declaration of Human Rights	UDHR
United States	US
Value Added Tax	VAT
World Health Organization	WHO
World Trade Organization	WTO

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1 Research Topic and Research Design

1.1 Research topic

In many developing countries, clear tensions can be observed between the implementation of policies seeking to promote the right to development, directly related with the protection of the economic, social and cultural (ESC) rights, on the one hand, and the economic policies and structural reforms suggested by multilateral banks (International Monetary Fund (IMF), World Bank, etc.) seeking macro-economic stability and growth, on the other hand.

Related to this issue, in the legal world, the constitutionalization of ESC rights has given constitutional adjudication a growing importance in many countries, increasing the relevance of (activist) constitutional courts worldwide². In the economic arena, globalization gradually transformed economic governance. Regulatory competences are spread across governance levels and across state borders and new regulating actors, both externally (e.g. IMF, WTO ...) and internally (e.g. constitutional courts, mixed private-public entities, etc.) emerged. Regulatory autonomy of traditional actors has therefore weakened and reaches in some countries relatively low levels. Institutions that have constitutional competences to regulate the economy (being, the executive, the legislative and the Central Bank) have lost terrain vis-à-vis these non-traditional actors who lack those regulatory competences³, but who play a growing and central role in the regulation of the economy.

In Colombia, the Political Constitution of 1991 (P.C.)⁴ positioned constitutional adjudication as one of the central features of the institutional design of the state and the Constitutional Court is recognized as activist in the defense of constitutional rights. However, the economic consequences of its rulings have also been accused of distorting prices, and affecting the fiscal management and legal certainty, to such an extent that the Court is seen as a problematic institution for growth and development (Novoa 2005:374). Paradoxically, the reform program of the judiciary, launched in the nineties to increase judicial productivity and independence, was accused of privileging the neo-liberal agenda (focused on property rights and public order), thereby affecting essential elements of the state, such as the protection of fundamental rights (Rodríguez et al. 2003, quoted by Novoa 2005:363). A specific critique was that law enforcement should

² In Europe, the German and Spanish constitutional courts are the prototypes of such courts (Engel 2001:188).

³ Self-regulation, deregulation, the reduction of public monopolies, privatizations, the so-called “delocalisation of production” and delegation of competencies, are economic phenomena of globalization and not isolated policies of one State (Faria 2001:100).

⁴ English translation http://confinder.richmond.edu/admin/docs/colombia_const2.pdf

not only depend on the calculation of the advantages and disadvantages of non-compliance as judicial reforms emphasized (Garcia V. 2004b:129). In this context, the growing role of courts in Latin America since the decade of the eighties has been empowered by “International Financial Institutions,..., development agencies, and NGOs” (Domingo and Sieder 2001, Larquin and Carrillo 1998, quoted by Wilson 2009: 65-6) with a non negligible channeling of resources for those purposes (Wilson 2009: 66).

These constitutional reforms, together with the fiscal and financial crises at the end of the decade of the nineties and the internal political conflict, have been determining public policy-making in Colombia⁵ (Kalmanovitz 2001, 2002; Lozano 2001; Clavijo 2001a, 2001b, 2001c; Alesina 2002). As a result, the conflict between constitutional rules, related to the recognition of the ESC rights as fundamental rights, and the economic crises and the need for macroeconomic stability has been growing constantly since 1991 (Kalmanovitz 1999, 2001, 2002; Uprimny 2000a, 2000b, 2001a, 2002; Clavijo 2001c; Torres 2002). Even defenders of the role of the Constitutional Court in protecting rights express their preoccupation about the resources needed to comply with the rulings that grant the rights, not only in Colombia, but also in other countries. Another preoccupation is about who has been benefiting from these rulings; although poor people are usually mentioned as target groups, the benefits may not be generalized or may be deviated by pressure groups (e.g. Wilson 2009:77-8).

One of the core issues of this research refers precisely to those rulings of the judiciary seeking to protect ESC rights without taking into consideration their economic effects. Defenders of such a position argue that the protection of these rights should be one of the principal functions of the Constitutional Court to reach the objectives of the Legal Social State (*Estado Social de Derecho*), otherwise the judiciary would be transformed into another political actor (Uprimny 2000a). Moreover, the Court is supposed to have contributed to building the rule of law through constitutional adjudication by becoming the “equity jurisdiction”, granting more power to the weak (Cepeda 2004b:650).⁶ This activism is also recognized as a

⁵ For instance, the financing of the peace process has been supported by peace bonuses, international cooperation and temporary budgetary deficits.

⁶ This topic has also been analyzed by a number of legal philosophers. For them, constitutional tribunals should create a normative model on the basis of two paradigms: the autopoietic paradigm of Luhmann and the discursive paradigm of Habermas. The first states that the priority of a constitutional court in fragmented societies (like the Colombian) is to reduce social complexity through the reduction of the complexity of the legal system. According to the second, the methodology of the constitutional tribunal should adopt a deontological interpretation of the constitution that guarantees just decisions for all to guarantee an effective reduction of complexity. This contrasts with a teleological interpretation which tries to materialize certain rights and therefore, some decisions may be only good for a few (Mejía and Guzman 2002:39-40). These approaches will not be further developed.

way to consolidate the democratic institutionalization and the defense of constitutional principles (Novoa 2005:366-7). However, these “progressive” rulings are accused of displacing the legitimacy of executive and/or legislative decisions, which appear as incapable to provide ESC rights. In consequence, socio-economic problems of part of the population are apparently solved by the Constitutional Court, although the solution is not always coordinated with the social policies for the whole population (Novoa 2005:368-70).

By contrast, economic regulators tend to adopt an institutional economics perspective⁷, emphasizing the need for a synergetic relationship between law and economics to solve the conflicts of interest in an efficient manner and to assure a better allocation of scarce resources (Kalmanovitz 1999, 2001, 2002). They defend the principles of macroeconomic stability and market liberalization as crucial for the viability of the Colombian state (Kalmanovitz 1999, 2001, 2002; Lozano 2001; Clavijo 2001a, 2001b, 2001c; Alesina 2002; Echeverry 2002:420-1; Wiesner 2004:25). For them, the Court has been adjudicating in economic matters without an explicit constitutional competence, creating new budget allocations. Those decisions are found neither reasonable, nor efficient for the redistribution of scarce resources, and even disturb regulatory measures enacted by Congress; for instance, the Court is accused of regulating markets as health, labor or housing instead of the Congress (Kugler and Rosenthal 2005; Kalmanovitz 1999, 2001, 2002). A study claims that the P.C. weakened the legislative and executive power, creating two new centers of power: the Constitutional Court and the Board of Directors of the Central Bank. The assessment of the behavior of these bodies led again to diverging views between lawyers, who defend the role of the Court, and economists, who consider that the intervention of the Court damaged the economic environment, whereas the Central Bank should have more autonomy as monetary authority⁸ (Pérez 2001:141-3).

The Court is thus accused of acting as positive legislator in economic matters, producing inefficiency because the society gets less goods and services than they could obtain otherwise.⁹ Those criticisms find support in studies that affirm that the judiciary lacks instruments to correct the redistribution of scarce resources, because it does not study systematically all the cases but only those presented to judges (Bouckaert 2002).

⁷ On this perspective, see for example, Medema et al. (1999); Kalmanovitz (2001; 2003b).

⁸ Some Constitutional Court rulings were accused of correcting “regulation failures” of the Board of Directors of the Central Bank in credit, monetary and exchange rate policies.

⁹ Some rulings were accused of encourage the breach of contracts, provide inflationist solutions or obstruct the use of production factors in the most productive way (Palacios 2001b:7).

Concrete criticisms of the Court focus on the following types of rulings: (i) when the Court modifies or reverses a statute based on constitutional principles and/or constitutional ESC rights, without looking at the budgetary or economic consequences, and even if those statutes do not directly violate any constitutional norm (Clavijo 2001c, 2004a, 2004b; Kalmanovitz 1999); (ii) when the Court gives compulsory orientations to the legislator to regulate specific economic sectors (e.g. financial and labor markets); (iii) when the Court explicitly not follow the regulations in force and decides to apply directly the P.C., i.e., the constitutional principles (e.g. health sector; public wages) (Kalmanovitz 2001, 2002; Uprimny 2000a, 2000b, 2001a, 2002; Clavijo 2001c; Torres 2002).

These rulings lead to political and budgetary problems: The former refer to the question of which political power has the best capacities to establish a social redistributive policy and to the problems related to letting the judiciary define the regulation criteria. The latter concern the difficulty for budgetary programming when the State should enforce these adjudications in an immediate way. The consequences for the poorest people have also been highlighted because, on the one hand, they are not aware of the judicial mechanisms to protect their rights, and on the other, social policies focusing on the poor change unexpectedly to comply with rulings ordering the provision of social services to specific citizens. Also affected are citizens who comply with legal regulations to have access to a social service, because administrative congestion and budgetary deficits impede or delay the service due to the need to comply with these adjudications.

In retrospective, members of the Constitutional Court have recognized the existence of different periods in this conflictive relationship between law and economics, which has been guided by the positions of the Court described as follows: (i) The pre-crisis period, between 1992-97, in which many sentences referred to economic liberalization and privatization reforms, most of them being upheld; the Constitutional Court was considered to be inspired by neo-liberalism. (ii) The 1998-2000 period, in which the main sentences in economic matters referred to norms enacted under the economic emergency scheme; with the same justices, several regulations were struck down without consensus among the justices. (iii) In the period from 2001-04, the Court was less detailed when ruling decisions with economic consequences and recognized that macroeconomic restrictions are a valid and legal reason to limit the scope of constitutional principles. It

took less part in controversies in macro-economic matters, leaving more room for the Congress and the executive (Cepeda 2004a:4).

Other analyses of the behavior of the Constitutional Court classified its rulings as a function of the periods of the justices: The period analyzed in the present research, was the so-called third Constitutional Court, elected between 1999 and 2001. This Court was considered as regressionist because gains in ESC justiciability obtained in previous periods were turned back. The pre-eminence of the general constitutional principles and rights lost terrain with respect to macroeconomic stability and the neo-liberal economic regulations. It was accused of being close to the opinions of national economic regulators and multilateral banks who think that the enforcement of fundamental rights, particularly ESC rights, represents a high budgetary cost which lacks realism in the present situation of Colombia (Mejía and Galindo 2005:384).

Against this background, this research aims to deepen the analysis of the tensions between the rulings concerning ESC rights and the policies of multilateral banks (particularly of the IMF) when the judiciary adjudicates on economic reforms enacted under a structural adjustment program. That is why the research will focus on the specific period of time starting when Colombia signed the first of three arrangements with the IMF. The thesis does not seek to perform an economic evaluation of the structural programs, but to study the interaction between the IMF arrangements and the Court case law. More concretely, the legal scope of the structural conditionality of the IMF support when it involves new regulations for the country, the legal consequences of non compliance with the structural reform plans, and the tensions between the arrangements and the case law of the Court related to the ESC rights, will be analyzed.

Since the end of the nineties, the economic and political situation worsened and Colombia initiated a series of structural programs with the IMF that made the relation between the judiciary and the economic regulators more complex. The ties between Colombia and the IMF strengthened since the country concluded three arrangements between December 1999 and September 2006. They can be summarized as follows: (i) a three-year Extended Fund Facility (EFF) (1999-2002) signed as a consequence of an accelerating recessionary trend in 1998, a deteriorated fiscal position, an unemployment level close to record levels, a crisis of the financial system and a peso (COP) under pressure; (ii) a Stand-By Arrangement (SBA) (2002-4) signed as a consequence of the negative effects on the economy of the breaking-off of the peace negotiations and the contagion from financial crises in other Latin American

countries at the beginning of 2002; (iii) a SBA of 18 months (2005-6), requested to support Colombia's economic program.

The Constitutional Court modified or reversed some reforms enacted under the guidelines of those arrangements. In some cases, it gave more importance to ESC rights, in other cases, some reforms were modified or reversed even if they did not directly violate the P.C. The economic authorities accused those rulings of being responsible for not accomplishing or only partially accomplishing some macroeconomic goals included in the timeframe of the arrangements (Clavijo 2001c, 2004a, 2004b; Kalmanovitz 1999). The Court declared the constitutionality of the IMF Articles of Agreement and its amendments; however, in general, ESC rights prevailed, as well as the constitutional principles of the Legal Social State (cf. C 931/04). The IMF, on its part, explicitly mentioned in some Country Reports (C.R.) some Court rulings affecting economic and financial policies. These rulings did not necessarily analyze the reforms enacted under the IMF arrangements and the IMF did not necessarily evaluate in detail their direct negative influence on the accomplishment of the goals sought by the structural reforms.

Having presented the broad research topic, section 1.2 sketches the development context of Colombia. The objectives of this thesis and the research questions will be presented in section 1.3. The empirical research design and methodology is treated in section 1.4. Chapter two presents the theoretical framework and chapter three presents a mapping of actors and processes. A general jurimetric analysis is performed in chapter four, while chapters five and six go deeper into the analysis of case studies. Chapter seven concludes.

1.2 Positioning Colombia on the scale of development

In order to contextualize this thesis, a few development indicators will briefly be presented for Colombia, other Latin American countries and selected extra-regional countries to which reference will be made in different parts of the text as benchmark cases.

If we decompose the UNDP's Human Development Index (HDI) into its various sub-indicators for the observed years (1999- 2007), it is shown that Colombia scored above the average of Latin America and the Caribbean for life expectancy until 2005 but below average since then. Colombia also under-performs on

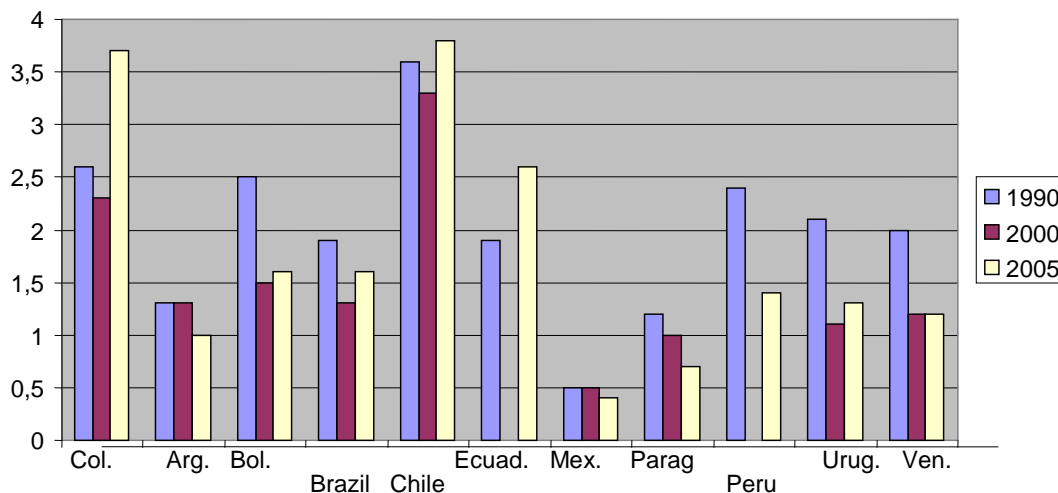
gross enrolment rates and per capita GDP, but the country over-performs on adult literacy (Annex 1.1.). But in general, all these indicators show a positive tendency over the last decade.

Colombia has managed to maintain positive but modest annual growth rates of per capita GDP over the last decades (see especially the period 1996-2002). During the years 2003-8 the rate increased to reach its maximum in 2007 (7,5%). However, it dramatically decreased in the two following years, falling to 0,4 % in 2009. Inflation is maybe the best macro-economic indicator for Colombia. It decreased remarkably; from 22,6% in 1994 to 2% in 2009. On the contrary, unemployment increased, reaching its highest level in 2000 (19,7 %) after which it decreased again, reaching (11,8%) in 2009 (Annex 1.4). These unemployment figures contrast with the remarkable improvement in labor regulation reported by Doing Business. The degree of rigidity in employment laws diminished dramatically from an index of 59 in 2004 to an index of 10 in 2010 (Annex 1.6).

From a global perspective and according to UNDP methodology, Colombia is part of the countries with a medium level of human development. If the overall development level is approached by means of UNDP's HDI, Colombia appears to occupy a relatively low position in the context of South America. Although these rankings are relatively stable over time, most of the Latin American countries (70%) saw their position worsen between 2001 and 2010, Colombia being the country that lost most terrain, occupying the antepenultimate place among the observed countries, only before Paraguay and Bolivia (Annex 1.2). In addition, Colombia shows a relatively skew income distribution (Annex 1.3.), with among the highest Gini coefficients, regionally and globally, and recent years do not show an improvement on this aspect. Part of the explanation is the actual situation of violence and internally displaced people, which is among the most serious worldwide (Annex 1.7). These facts have a strong incidence on the development indicators¹⁰. The current configuration of the conflict (i.e. since the 1960s) involves leftist guerrillas and para-militaries, and is linked to illegal drugs trade. Another relevant repercussion on economic policy-making is through its impact on public spending. Military expenditure figures are among the highest of Latin America, only comparable to those in Chile (Figure 1.1). This obviously reduces the budgetary space for policy-making.

¹⁰ This issue reflects the interaction between rights and fiscal policies. In 1999 the IMF estimated the number of internally displaced persons in need of public assistance in about one million, which increased the pressure on public resources (C.R. 99/149:24). In 2004, The Court (T025/04) declared the "unconstitutional status quo" ("*estado de cosas inconstitucional*") because public policies had not been providing assistance to internal displaced people, despite that Law 387/97 established measures to prevent internal displacement and to assist and provide socio economic stabilization to this population. The problem, instead of improving, has been worsening and in 2008 the Court requested the government to comply with T025/04.

Figure 1.1: Military expenditure (% of GDP)



Source: UNDP, Human Development Reports (2001-7).

However, this difficult economic and security situation of the country seems to coexist with a relatively high level of institutional development and solidity. In fact, the last reports of Doing Business (2004-10) present Colombia as one of the countries with the best improvement in institutional protection of investments (Annex 1.6). In addition, next to the long tradition of democratically elected governments –when compared to the region-, other indicators point in the same direction, like corruption indicators, for example. According to the most comprehensive of these indicators, the corruption perceptions index of Transparency International, Colombia is only preceded by Chile and Uruguay and scores better than all the other South American countries and Mexico. This good result is confirmed by the corruption component of the opacity index of the Kurtzman Group (previously PriceWaterhouseCoopers) (Annex 1.8).

After briefly sketching the development context, the following sections present a delineation of the present thesis.

1.3 Objectives of thesis

The general objective of this thesis is the critical legal analysis of the interaction between the Colombian Constitutional Court case law and the structural conditions presented as guidelines of legal reforms included in the IMF structural adjustment arrangements signed by the country during the period December 1999- November 2006, with special reference to those sentences referring to ESC rights. The specific objectives of this thesis are the following:

- Evaluation of the Constitutional Court case law with respect to: (i) the institutional design: constitutional framework of constitutional case law; (ii) discretionary competences of the judiciary, and potential usurpation of political and legislative competences; (iii) judicial activism and judicial independence (political pressure, role of ideology); (iv) the quality of argumentation: theoretical basis, legal method, coherence, institutional capacity to analyze complex matters, the influence of foreign and international law systems in adjudication; (vi) Accountability of constitutional adjudication.

- Analysis of the normative character of structural adjustment arrangements of the IMF, particularly, (i) the constitutional and international regulation of the legal scope of IMF activities in the country, (ii) the scope of the IMF structural conditionality.

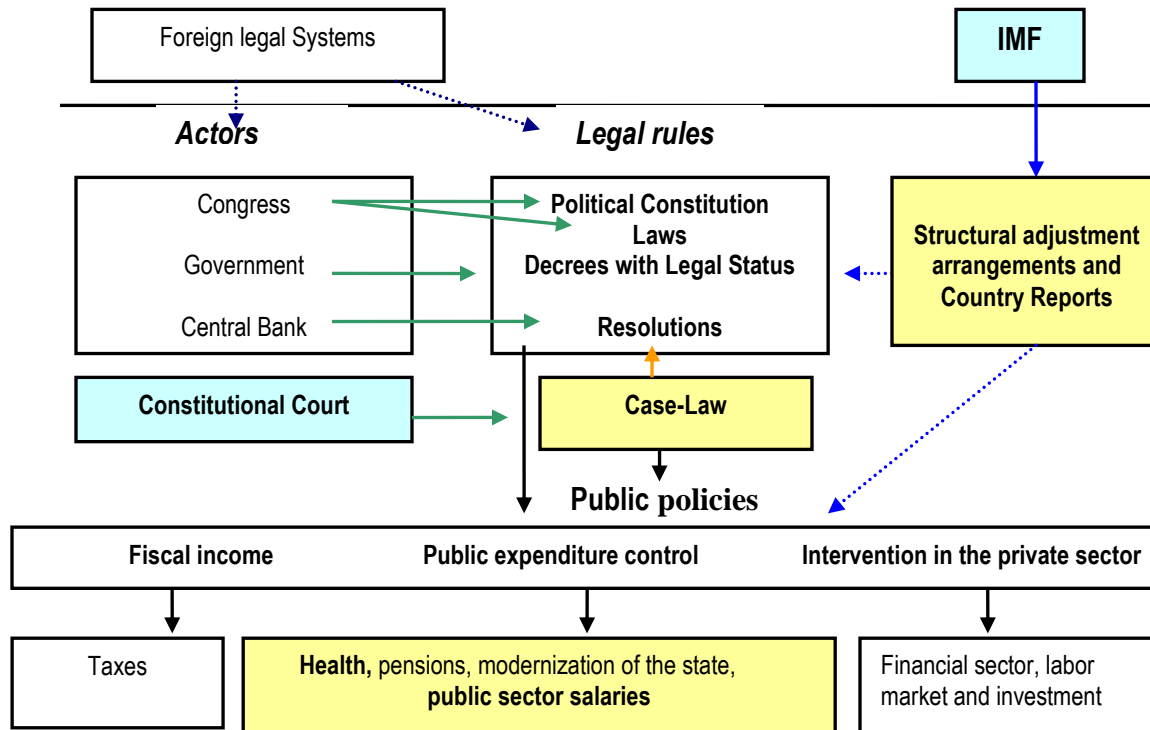
- Analysis of the interaction between constitutional case law and IMF arrangements and how the Constitutional Court ruled on structural reforms with high economic complexity: (i) The Legal reasoning of the Court in the adjudication on structural reforms proposed by IMF Arrangements; (ii) the scope given by constitutional case law to structural conditions of IMF arrangements; (iii) the relevance of constitutional case law protecting ESC rights for the compliance of structural conditionality; (iv) the degree of complementarity (or dysfunctionality) of constitutional case law, IMF arrangements and development.

1.4 Research design

The project concentrates mainly on the role that the Constitutional Court and the IMF are playing in the implementation of public policies in Colombia, the interaction between these two actors, and the tensions between the contents of the arrangements and the case law of the Court, mainly related to ESC rights. However, other actors will be referred to and included in the analysis whenever relevant: Congress, government, etc. But they will not be the subject of particular analysis. Figure 1.2 presents the relevant actors, rules and public policies intervening in this project and their potential or actual interactions. Actors, rules and policies in bold are the core content of this work. In terms of legal instruments and rules, the analysis will focus on the case law of the Constitutional Court and the C.R. of the IMF (which contain the periodical reviews of the structural adjustment programs) within the constitutional and legal context in Colombia. As far as the public policy incidence is concerned, detailed analyses of the health and public sector salaries is presented in chapters five and six. The cases were chosen considering their relevance

from the perspective of ESC rights and the Court (especially in the case of health) and from the perspective of the IMF evaluations (especially in the case of the rulings on public sector wages).

Figure 1.2: Relevant actors and legal institutions



The main variables considered in the analysis will be extracted, on the one hand, from structural benchmarks imposed by the IMF and evaluated in the periodical C.R., and on the other, from Constitutional Court rulings on structural reforms undertaken in the Structural Adjustment Arrangements:

- The normative character of the IMF Structural Adjustment Arrangements in Colombia;
- The institutional capacity of the Constitutional Court to rule over structural reforms: judicial independence, judicial accountability and judicial activism.
- The relevance of the ESC rights and general constitutional principles in the Court case law.
- The impact on public policies of Constitutional Court adjudication;
- The incidence of the Constitutional Court case law on the IMF programs evaluations;

1.5 Research questions

1.5.1 The Institutional capacity of the Constitutional Court:

A first set of questions concerns the analysis of the Constitutional Court case law and seeks to develop the first specific objective of this thesis:

- Is the active role of the Court a problem of auto-attribution of competences (judicial activism), or, is it related to the text of the Constitution itself? When judicial activism, judicial independence and discretionary competences of the judiciary are looked at, are there indications of usurpation of political and/or legislative competences?
- Which of the two actions (judicial review or the action of protection of fundamental rights (APFR¹¹)) was used by the Court to play a more activist role and which of them has had more influence on public policies? Does the Court argue differently in each of them? In which action was the socio-economic context presented by the government seen as a valid argument and in which one has the Court stucked to its ideology, interpreting the constitutional rights in a positive way (Cepeda 2004b)? Did the Court defend “its ideology” without considering the possible economic consequences of those decisions?
- How is consensus reached inside the Constitutional Court, and which are the features and trends of dissenting or concurring votes?
- Are the concepts of rationality and sovereignty of the legislator used dogmatically in case law argumentation, or do they assume the myth of the rational judge and does the balancing method therefore prevail? Is the Court independent, impartial and accountable? Is the influence of foreign case law and doctrine notorious and is there a case law “transplant”? Does it enforce the institutional capacity of the Court or has it been used strategically?
- Is it possible to limit the interpretative method used by the Court to avoid arbitrariness, particularly when it argues that the effectiveness of rights and constitutional principles lead to striking down or conditioning economic reforms? Can objective criteria be designed to limit the competences of the Court with respect to constitutional interpretation, particularly when its own competences are to be interpreted (Palacios 2001b)?
- Is the justiciability of ESC rights by the Court in accordance with the parameters provided by international treaties, or do these rulings depend on the ideology of the Court? Does the Court extra-limit its competences when it takes up the role of legislator to correct the deficiencies of the law or to assure the effectiveness of rights?

¹¹ It is also translated as writ of protection.

1.5.2 The Normative character of the Structural Adjustment Arrangements

A second set of questions concerns the legal scope (normative character) of the Structural Adjustment Arrangements agreed with the IMF. In addition, these questions refer to whether economic complexity of the structural reforms may be an element that affects the Court legal reasoning (Clavijo 2001c; 2004a, 2004b; Kugler and Rosenthal, 2005).

- Is the State obliged to fulfill structural reforms established in the Structural Arrangements? Which national powers have to respect these regulatory policies? Is the judiciary constrained by IMF arrangements when analyzing the constitutionality of structural reforms?
- Which are the legal consequences of macroeconomic goals being totally or partially reached by other means and structural reforms not being completed? Is there any evidence that the arrangements are used by governments to impose their own unpopular policies?

1.5.3 The interaction between the Constitutional case Law and the IMF arrangements

- How was the legal reasoning employed by the Court to adjudicate on structural reforms undertaken in the framework of the IMF arrangements? Has the Court the capacity to rule on “complex economic issues”? Does it consider the potential economic consequences as relevant? Is it possible to measure the distorting effects of constitutional case law on the goals of the arrangements?
- How coherent are the periodical evaluations of the IMF vis-à-vis the role of constitutional case law in the accomplishment of the goals of the arrangements? What is the role of the government?
- Do the IMF and the Constitutional Court influence distributive policies (development)?

1.6 Methodology

1.6.1 General approach and structure of the thesis

The approach follows Kinney and Clarck’s suggestions to organize a research project: firstly, an explanation is presented of how the research was developed, secondly, the relevant theoretical framework is summarized, thirdly, the findings of the empirical analysis are presented, and finally a theoretical discussion explains the findings and concludes (Kinney and Clarck, 2004).

In order to grasp the multi-dimensional character of the issues, a pluralistic theoretical framework was employed. Chapter two presents the main legal theories concerned with constitutional adjudication and judicial behavior, with the purpose to better understand the reasoning of the Colombian Constitutional Court when analyzing of the IMF arrangements, and the potential relevance of legal and case law transplants. A theoretical analysis of the scope of IMF conditionality is also included to identify its potentially binding character in adjudication and whether the obligation to fulfill the structural reforms established by the IMF agreements concerns all the authorities (including the judiciary). In chapter three the actors and their main actions are described to facilitate the understanding of the issues at stake.

A combination of qualitative and quantitative approaches was chosen for the empirical analysis. The nature of the primary sources of data used here, namely Constitutional Court case law and IMF C.R. (essentially long and complex texts with legal, political and economic content) and the nature of the research topic and its formulation make a qualitative analysis appropriate and essential (Strauss and Corbin 1990:19; Maoz 2002:181). Even if one attempts to analyze quantitatively this type of research problems, qualitative assessments and filtering is necessary to extract quantifiable information. A purely quantitative analysis of texts has serious limitations; these include the ex ante definition of (relevant) categories in order to be able to count “events” and the exclusion of the social context of the texts (Silverman, 2000:128). Quantitative analysis is able to capture tendencies and to point to relevant variables for further analysis. However, it cannot substitute a holistic evaluation of the behavior of judges (Sisk and Heise 2004). In addition, relevant variables for the evaluation of courts, such as transparency or independence, are difficult or even impossible to measure.

However, given this ‘natural’ choice of a qualitative approach to study the adjudication process of the Colombian Constitutional Court, and the IMF structural reforms, a combination with quantitative analysis was sought, in line with the recommendations of various experts on qualitative methodology (Silverman, 2000; Levy, 2002:150-151; Eisenhardt 2002:14). The objectives of combining both types of analysis are double. On the one hand, quantitative analysis allows for obtaining information on the characteristics of the population from which the cases (here: constitutional case-law in a particular policy area) are selected. This way, the case selection process can be better steered, transparency is increased, and the generalizability/validity of the results of the case studies can be better established (comparing the selected cases with the characteristics of the population) (Silverman 2000:102-104; Maoz 2002:166,181). On the

other hand, the rigor and accuracy of the analysis increase, provided that the variables are well measured (Silverman 2000:184-185).¹²

The empirical part of this research is therefore organized on two levels. On a general cross-sectoral level, a jurimetric analysis was performed. Jurimetrics is defined as the measurement of different aspects of the functioning of systems of judicial administration and the statistical methodologies that serve to evaluate their functioning (Buscaglia 2006:16). This is complemented, at the sectoral level, by an in-depth analysis of two selected cases. The jurimetric analysis serves a double purpose: (i) to describe and characterize the “population” of sentences from which the cases will be selected; (ii) to complement the rather qualitative in-depth analyses of a selection of cases with a population-wide quantitative analysis of the impact of Constitutional Court case-law on economic reforms under IMF Arrangements. Although one should be aware of the dangers of selection bias, non-random or “purposive” case selection is usually recommended in qualitative case-study analysis (Silverman 2000:104-106; Eisenhardt 2002:12-13; Maoz 2002:166; Levy 2002:141). Purposive sampling makes sure that the selected cases (chapters 5 and 6) are relevant, given the objectives of the study. The thesis will be structured as follows:

1.6.2 Data sources

The data sources of this project are mainly the case law of the Constitutional Court and the Country Reports (C.R.) of the IMF which contain the periodical reviews of the structural programs followed by Colombia. Those documents are public and accessible through the websites of these institutions: www.imf.org/external/country/COL/index.htm for the IMF and www.constitucional.gov.co/corte/ for the Constitutional Court. From these websites, the selected sentences and C.R. were those that are relevant for the analyzed period (Dec 1999-2006) and for the subject of the research (the interaction between the Constitutional Court case law and the Structural Adjustment Arrangements).

1.6.3 Selection of case law: jurimetric analysis.

The process to select the Constitutional Court case law and to analyze its interaction with the IMF Arrangements was as follows. The point of departure were the structural reforms mentioned in the letters of intent of the arrangements and in the subsequent IMF C.R. On the basis of the three arrangements, the

¹² Empirical legal studies related to high court adjudication have addressed several issues, including: the effects of ideology on the selection and decision-making of judges (Sisk and Heise 2004)

structural conditions were mapped using the C.R. as main sources. In these reports, the letters of intent and the memoranda of economic policies were analyzed as well as the periodical program reviews performed by the IMF staff with the cooperation of the Colombian government. Sectors were classified in accordance with the typology suggested by the IMF. Then, the laws directly related with those sectors were selected from the totality of laws enacted by the State, and a selection of all the sentences related to those legal reforms were selected from the totality of case law produced by the Constitutional Court. The details of this procedure are presented in chapter four. The jurimetric analysis provides thus a complete panorama of the case law of the Constitutional Court by sector included in the structural conditions. Further, a sub-set of rulings striking down a structural reform, or conditioning its constitutionality, was jurimetrically analyzed per sector.

Public opinion was also taken into account, and was based on a screening of news items. Rulings analyzed by the press were signaled to assess the political sensitivity of certain issues. This follows research practice in the US where the assessment of the importance of (Supreme Court) cases has also been based on their reporting on the front page of the New York Times. This was for example the case in Mayhew (1991) and Staudt et al. (2008). Choi and Gulati (2006:21) also followed Epstein and Segal (2000) in focusing on news relating to the US Supreme Court on the first page of the New York Times, in order to identify “high state areas with political salience for circuit court judges”. Epstein et al. (2004) recognize however that a selection bias is thereby possible; civil rights cases tend to draw more media attention than, for example, economic cases in spite of the possible transcendence of the latter. In the jurimetric chapter a revision of the contents of the main Colombian newspapers is presented, over a period of five years (2004-8).

1.6.4 Selection of case law: in depth analysis

Considering the vast amount of information obtained, the jurimetric exercise of chapter four was complemented with an in-depth analysis of case law in two sectors. The most relevant sector from the perspective of the Court has been the health sector, whereas the IMF C.R. point to the Constitutional Court rulings on the annual increase of the public sector wages as the most controversial. Although pensions and taxes were also relevant for the structural adjustment, the limitations of this thesis obliged to choose only the most controversial sectors and taking into consideration their relevance from the point of view of ESC rights.

Case law that struck down statutes or that conditioned its constitutionality is of particular importance for the research, because those cases can be considered as distortions of the economic reforms adopted under the IMF Arrangements provided that they modify and/or limit the scope of these reforms. Particular attention went to establishing whether these cases took into consideration the IMF Arrangements (cf. normative scope of the structural conditions), and whether they were decided on the basis of the protection of ESC rights or on the basis of the general constitutional principles.

Among the selected rulings, the protection of ESC rights had a privileged place because of the scope given by the Constitutional Court, which has positioned them as the corner stone of their reasoning (Cepeda 2004a; 2004b). In addition, taking into account that those rights have been considered as fundamental, and therefore, protected through the APFR, case law related with the selected sectors include both the judicial review and the APFR case law, when they are relevant. Among the rulings that declare the unconstitutionality or the conditioned constitutionality of a reform, those adjudications that may have an incidence on public expenditure are of particular interest, because of their potential impact on the IMF arrangements; for example, rulings that extend a payment term, that declare a reduction of some expenditure as unconstitutional, or that declare some public revenues as unconstitutional. Particular emphasis was placed on those sentences mentioned by the IMF as perturbing the macroeconomic goals of the arrangements, or those that modify a structural reform considered as crucial in the adjustment program.

Finally, controversial decisions detected on the basis of the decision making process inside the Constitutional Court were highlighted: unanimous adjudication versus dissenting or concurring votes. Critical non-unanimous decisions are of particular value for the analysis of the Court decision-making process.

1.6.5 Design of in-depth judicial review case law analysis and typology of arguments

The in-depth analysis of selected case-law focuses on the argumentation of the Constitutional Court in order to identify its institutional characteristics and to assess judicial activism, its independence and accountability. This analysis also allowed the identification of the relevance of IMF arrangements in the adjudication process of structural measures. Considering the huge variety of legal theories on adjudication, some articles were of particular relevance to find a typology applicable to the arguments of the Court (see

next section). Although some of these works deepen the analysis more, referring for instance to the typology of transformative operations, in this research the focus was put on the arguments.

The typology followed to classify the Court's arguments is based on a combination of Summers (1997), Kennedy (1994) and Kim (2008). In chapter two, the generalized use of "arguments" and their balancing by constitutional courts worldwide are presented in the theoretical framework to facilitate the identification and evaluation of those privileged by the Constitutional Court. The theoretical framework was elaborated to put into context the trends in adjudication of the Court and to better understand the criticisms. This was not limited to a particular approach to analyze constitutional case law, because the Court did not use a particular approach neither. On the contrary, the Court used a high degree of discretion to choose the method and to decide the way in which it is applied, which mainly depends on the way the reporting justice understands it.

The method of designing a general procedure to interpret judicial arguments, specifying the tools used to interpret and to identify the potential superiority of any argument in the balancing process was proposed by Summers (1997:119)¹³. From the three references mentioned above, a combined typology of judicial arguments was developed to be applied to the case law analysis of the Colombian Constitutional Court (figure 1.4.). The first step in the classification distinguishes between formal and other arguments, being the former those related to the procedures of creation and enactment of the law and the latter those related to contents, which are more diverse and numerous and have been sub divided as follows:

A. Interpretative Arguments:

They are the basis of adjudication and they are usually constructed on a "condensed" legal reason that emerged from the equilibrium of different arguments. The sub categories are as follows:

A.1 Textual and logical arguments

a. Plain meaning rule or common sense argument is based on the usual meaning of the word, which is the privileged option (Summers 1997:110)

b. "Technical sense argument" is based on legal or specific uses of the term in a discipline (Summers 1997:110-1).

¹³ In the US the privileged arguments are: common sense, final purpose and legislative history (Summers 1997:119).

c. "**Context meaning argument**" seeks to interpret the statute as harmonious as possible. The interpretation should, if possible, give effect to "every clause and word of the statute avoiding any construction which implies that the legislature was ignorant of the meaning of the language" employed and "avoiding to render superfluous any part of the statute" (Kim 2008:12; Summers 1997:111).

d. "**Canons of construction**" and/or "**legal general principles to interpret the law**"; they are called "axioms of experience" or aphorism and they are arguments based on them; the "General principles of the law" can be presented sometimes as presumptions of legal interpretation (Summers 1997:112).

e. **Arguments based on grammar rules**: There are many examples of these arguments: how to interpret conjunctions, definite and indefinite clauses, auxiliary verbs, general specific and associated words, etc. Although this level of detail is not developed further, of particular relevance are some indications employed in the analysis of the US Supreme Court case law, stating that: i) Punctuation is not considered as a main part of the statute. ii) The title is an auxiliary criterion of interpretation but without limiting the plain meaning of the text or adding what the text of the statute excluded. The same is applied to the preambles and the "whereas clauses" (Kim 2008:12-6 and 35-7.)

f. **The use of logic forms of arguments** as analogy, reduction ad absurdum etc. However, when using analogy one should be aware that when the statute uses a specific term in one part and not in another, the presumption is that the exclusion was the purpose (Kim 2008:18; Summers 1997:112 and 116).

A.2 Legislative intention and purposive arguments

a. **Final purpose of the law argument** sometimes appears explicitly and sometimes implicitly. It may be confused with legislative intention. It may be explicit in the text of the law, or it may be in the legislative antecedents (Summers 1997:112). They can be vague and therefore difficult to apply.

b. **Legislative Intention argument**: This is an argument seeking to give prevalence to the will of the Legislator. The source is all the documents of the legislative antecedents (Summers 1997:112). In the US Supreme Court case law, the judiciary accepts this prevalence and therefore the subordination of the linguistic rules of the "statutory construction as well as other interpretative principles to overriding presumptions that favor particular substantive results" only if the Congress that "wishes to achieve a particular result inconsistent with the Court's view of legal traditions" establishes it as clear as possible. In other words, when the Legislator would like to modify a "judicial law" it should be done expressly; it is a presumption favoring judge made law (Kim 2008:21-35). In the US some presumptions of legislative

intention have become “interpretative arguments” (Kim 2008:21-35 Summers 1997:115). The legislator aimed at:

- a “constitutional law”. Unconstitutionality should be avoided when it is “fairly possible”. The “Argument of selection” of a specific meaning that avoids constitutional problems is thus accepted;
- a “prospective law” and not a retroactive law;
- the normal use of the words be privileged;
- the avoidance of absurd or unjust results;
- the restrictive use of sanctions; i.e., when deadlines for administrative action or the consequences for non compliance with statutory timing provisions were omitted by the statute, the courts should not impose their own coercive sanction (Kim 208:42-3).
- a great weight of “legislative interpretation”.

A.3 “Judicial authority arguments”

It refers to the action of the courts in the process of adjudication.

a. “Historic interpretation” argument; may be confused with the legislative history which in turn may be used to give a background of general information, but it can also be used to explain specific parts or words of the statute, which the judiciary considers as not clear. This use is more controversial because the quotation may not be precise enough (Kim 2008:45-7). It refers to the historic evolution of the concept in courts, which may also be as a “post enactment history” (Kim 2008:48; Summers 1997:112).

b. The “severability clause” is established to guarantee the effectiveness of part of a statute when it was partially struck down as unconstitutional. It is commonly accepted. In the US, non severability directives should clearly be respected by courts (Kim 2008:38 and 42). This clause is qualified as a sort of legislative competence to the judiciary. A similar situation is the case of arguments that privilege a specific meaning to avoid a constitutional problem (Summers 1997:115).

c. “Precedent” argument is based on the former interpretation of the statute by Courts. This argument also related to arguments based on the legislative acceptance of previous administrative or judicial interpretations, mainly used by litigants and by judicial opinions (Summers 1997:112).

B.1 Non Interpretative arguments:

They do not refer to the statute itself and in some cases they could be opposed to legal reasons based on the statute for ethical or policy reasons. The main arguments identified were as follows:

a. Coherence argument vis-à-vis a general legal concept accepted in the specific branches of law (Summers 1997:112). Although these arguments are sometimes classified as interpretative arguments, given the definitions above, it is more appropriate to include them here.

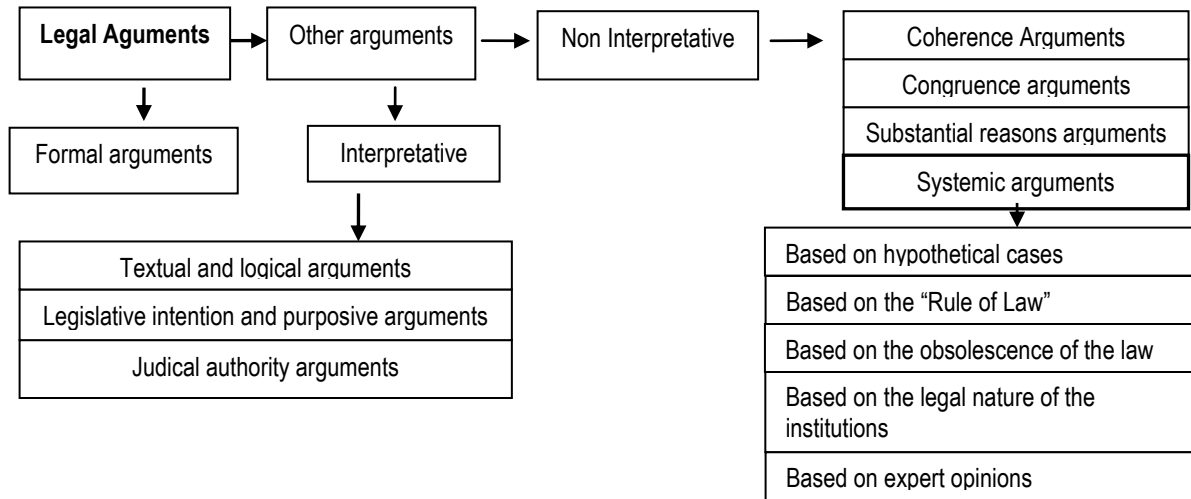
b. “Congruence argument” seeks that the statute be in accordance with a public policy. Summers (1997:112) included this argument in the category of interpretative arguments when those policies are "valid and pertinent" inside the area of the law. However, in this research it was included here because they are used more and more not only with “valid and pertinent” public policies inside the area of the statute, but also more in general. The analysis of policy arguments is typical for US case law whereas, Europeans are unfamiliar with the analysis of policy arguments (Kennedy 1991).

c. “Substantial reasons argument”: It is supported by moral, political and economic considerations and can also include arguments based on moral reason, on a right (s) reason, and on the consequences vis-à-vis (desirable) social goals (Summers 1997:115; Kennedy 1994:328). The employment of these arguments is frequent when the text of the statute is vague (Summers 1997:115). Kennedy talks about “Argument bites” that include not only statutory interpretation but also policy reasons; it is a derivation of the general analysis of signs in linguistics (Kennedy 1994: 353). Kennedy identified within this category of arguments, those based on moral reason, on rights, on social welfare considerations and on expectations. They are used as “ultimate” and therefore they do not have further justification (Kennedy 1991: xx).

d. Systemic arguments: they include mainly arguments based on administrative reasons and/or institutional capacity (Kennedy 1994: 327-8). These arguments are not autonomous because they are usually presented as the support of substantial reasons arguments and Summers 1997 (116) added other referred also to arguments not directly related with the text of the statute:

- a. Arguments based on the normative nature of the institutions that justify the choice of interpretation;
- b. Arguments based on the "Rule of Law" ;
- c. Arguments based on expert opinions; (which are common when the statute is vague);
- d. Arguments based on hypothetical cases;
- e. Arguments based on the obsolescence of the law.

Figure 1.3 Typology of legal arguments used by the judiciary



2 Theoretical Framework

2.1 Introduction

Judicial adjudication has been one of the most controversial topics in legal theory for many years. Within this topic, constitutional interpretation and the existence of judicial discretion are particularly relevant for the present research. The classification and understanding of the different schools and approaches to judicial adjudication has been the object of thousands of pages. The different approaches often originate in different legal systems but with the globalization of legal thought they are inter-connected and new approaches emerge to understand judicial reasoning worldwide. The fact that certain authors sometimes change their views or may be catalogued in different and opposite schools depending on the “interpretation” of their theories further adds to the difficulty of organizing the relevant ideas and theories. In the next sections, a mapping will be presented of the main legal theories concerned with constitutional adjudication and judicial behavior, with the purpose of understanding better the reasoning of the Colombian Constitutional Court in the analysis of the IMF arrangements. Of particular importance is the literature that has been influential in the Latin American legal world and in Colombia in particular. One of the related objectives is to put in evidence whether the Constitutional Court has a coherent method of interpretation, or whether they use different theoretical bases and foreign doctrine (sometimes mutually contradictory) to its own convenience (García A. 2003, 2006a, 2006b, 2007; Atienza, 1997A; Atienza y Ferrajoli 2005; López M. 2000) and therefore, to analyze whether constitutional adjudication based on discretionary judicial competences (Buscaglia, 2005) may have led to arbitrary rulings.

Normative approaches to legal methodology focus on the techniques and the form of interpretative arguments¹⁴, and seek “to guide and constrain” the judiciary to warrant legal certainty and “equality before the law”. Those techniques, far from being concrete and clear, are in fact an enormous amount of diverse and sometimes contradictory opinions that promote or reject judicial discretion (Spaak 2003:238; Friedman 2004:1257-8). Positive approaches to adjudication have been dominated by social sciences and focus mainly on the analysis of the judiciary as a political institution and the judge as a (rational) individual, how they work, which methods they use and why (Friedman 2004:1257-1258). Models and empirical analyses are used to explain judicial behavior and to find potential political motivations in constitutional rulings. Normative approaches, in contrast, assume that judges usually base their rulings on their “sincere” understandings of law requirements and reject strategic behavior (Friedman 2004:1273-4). In this chapter,

¹⁴ This includes the so-called presumptions and rules (“conflict-solving maxims”) (Spaak 2003:238).

this broad classification of approaches will be followed for the sake of simplicity. The theoretical work will be complemented by results of empirical analysis wherever relevant.

2.2 The Normative perspective on judicial adjudication

One of the reasons put forward for the multiplication of legal theories was the active influence from different philosophical perspectives¹⁵, mainly since the 1970s, which sought to impose the results of their research to legal dogmatism (Broekman 1997:83). Legal dogmatism has been relevant in countries with a continental law tradition, based on the obligatory character of the law and the rationality of the legislator (Nino 2001:321-2). It has been exclusively focusing on positive law, using a deductive method that pretended to organize legal norms logically and systematically to facilitate their application.¹⁶ It concentrates on intra-systemic analysis and points to the incompatibility, ambiguity, emptiness, or indeterminacy of legal concepts (which is called ‘formal legal rationality analyses’). Issues as legislative guidelines, justice, social consequences, or efficiency are not considered (Gonzalez A. 1994: 931).

The main topic within judicial adjudication is judicial discretion. The acceptance (or not) of this competence and its scope, as well as the acceptance (or not) of the indetermination of the law are the issues that make the different schools converge or diverge (Lifante 2002:415,420). Legal discretion is defined as the possibility of an institution to make choices among different alternatives under the limitations of a legal framework (Lifante 2002:414). Discretionary competences may unilaterally affect specific interests through the application and interpretation of rules; they are seen as powers to decide according to specific evaluations and considering specific realities. The control of discretion is the issue (Lifante 2002:429, 437).

Legal Dogmatism does not easily accept judicial discretion, because it seeks to provide valid solutions to all cases, and therefore judicial discretion has been analyzed more from the perspective of common law systems (Nino 2001:432-3). Dogmatism rejected judicial discretion because it was seen as inconvenient and avoidable through the use of legal skills provided to the judge, enabling him/her to find the correct solution to each case. This was the dominant position in the XIX century supported by the French School of

¹⁵ The main representative schools have been the analytic school, the logic school, the semantic school, the theories of argumentation and discourse (Broekman 1997:83).

¹⁶ Legal dogmatism or “doctrine” is also defined as an evaluative and non neutral activity with practical goals and whose theses are not verifiable or falsifiable (Pfersmann 2001:242).

the Exegesis¹⁷ (see Bouckaert: 1981) and the German Jurisprudence of concepts¹⁸. They based their arguments on the hypotheses that the legal system is: i) *complete* because it provides all the solutions and there are no gaps; hence, judges should not “invent” the solution to a specific case; ii) *coherent* because there are no antinomies, i.e. judges do not find contradictory solutions in the law; iii) *clear* and thus it is never necessary to interpret the law. In the same way, the facts of the cases were always seen as sufficiently clear so that the judges do not need to value them (García A. 2006a:156-7). This approach is also known as Legal Formalism which highlights the following virtues of the law: “clarity, determinacy, and coherence”, seeking to differentiate legislation from adjudication. Inside this approach, two perspectives were distinguished: the “rule-formalist” and the “concept-formalist”. The first defended the determinacy of the law and hence the restricted judicial interpretation; the second defended the use of a “principled coherence” based on the law (Grey 2003:4).

In the XX century an explosion of schools attacked Legal Formalism. The most representative were the Jurisprudence of Interests in Germany, and the Sociological Theory of the Law in France (Frydman 2007:6). Other movements were the German Free Law Movement, Austrian Legal Positivism, and US Legal Realism. All of them criticized the paradigm of the rational legislator and accepted judicial discretion, although with differences in its scope. Some of them supported absolute judicial discretion¹⁹ whereas others had more moderate theses (García A. 2006a:168).²⁰

The North-American legal system is considered less formalist than the English, continental and Latin-American legal systems. That is why moral philosophy, legal realism, law and economics, and pragmatism

¹⁷ This school mainly developed after the enactment of the Civil Code of 1804, identified the law with the legislative purposes (Xifaras 2001:177). This approach is known as the paradigm of the rational legislator, developed by Nino (1983:328-9) and criticized by Van Ost and Van de Kerchove (2001).

¹⁸ The influence of this school in Latin America is shown in Flóres A. (2006) and López M. (2004).

¹⁹ Theories that considered absolute judicial discretion affirmed that adjudication is totally arbitrary, which was implausible for other theorists (Klatt 2007:507).

²⁰ Another classification of legal theories, presented by Wróblewski (1992), is based on the ideologies of adjudication, used to identify, interpret and enforce the law (Siltala 2003:125). He distinguished between “the ideologies of bound, free and legal, and rational judicial decision-making” (Wróblewski 1992:270, 273-314, quoted by Siltala 2003:123). The first is based on political liberalism and legal positivism and seeks to protect individual rights against the State and other persons. Schools that belong to this movement are the English school of analytical jurisprudence, the German school of *Begriffsjurisprudenz*, and the French exegetic school. They promoted legal certainty, liberty, stability and consistency (Siltala 2003:124). The second ideology includes movements opposed to Legal Formalism such as the school of the *libre recherche scientifique* of Génny, the German Free Law Movement, sociological jurisprudence, US legal realism, and the *Führerstaat* ideology of Nazi Germany (Siltala 2003:124). The third seeks to protect the legality and rationality in judicial adjudication (Siltala 2003:123). However this approach is not followed here because ideology is not the center of the research and goes beyond the objectives of this research. With respect to ideology, another perspective affirms that discussions about the nature of the law are a form of understanding, not a judgment; this perspective in contrast defends that legal theory should be “basically descriptive and morally neutral” (Marmor 2005a:26-7).

developed faster there than in other regions, like Europe, where legal positivism occupied a hegemonic position (Atiyah and Summers 1987, quoted by Atienza and Ferrajoli 2005: 21).²¹ Anti-formalism has also been assimilated with Policy Jurisprudence and Modern Rights Theory. The former considers the law as a means to reach social goals, and therefore, interpretation should have a purpose and take policies and interests into account. The latter promotes “distinctions between interests and rights and between policies and principles” focusing on “rights and principles”. It promotes the balancing method of rights, interests and policies as proposed by Dworkin (Grey 2003:6). Anti-formalism, defined and mainly adopted in US normative legal theory, is sometimes qualified as “principled and pragmatic legal theories” (Spaak 2003:240).

“Orthodox approaches” is another denomination for these modern legal theories, linked with the positivist tradition in Anglo-American legal theory (MacCormick, Raz, Dworkin and Sunstein).²² They are grouped together because they were supposed to share the following arguments: judicial adjudication is “relatively constrained by standards relatively determinate” because more than one option is “justifiable in principle and in practice”. Justification choices are limited and recognizable because they should be adjusted to the law and values, they should be consistent and coherent with the legal basis and they should have a consequentialist evaluation of the rulings’ effects. For this movement, adjudication is mostly “reasonable, predictable and certain” because judicial choices are normally justifiable and based on a restricted selection of arguments (Lucy 2004:1-3). They disagree on how “hard cases” have to be decided. Despite that many legal systems have rules to guide the judiciary when interpreting statutory or judicial rules, this approach does not hierarchize rules attributing greater and lesser weight to each of them and hence, the choice is open (Lucy 2004:7).²³ In contrast, “Critical or Heretic Theories” affirm the indeterminacy of the law and the subjective character of adjudication, which is ideological and political (Rodríguez G.1999: 21-3; Lucy 2004).

²¹ In Spain the Kelsenian model has been replaced by Hart’s model; Dworkin is not considered as part of the legal culture (Atienza and Ferrajoli 2005: 22).

²² Continental theorists as Alexy, Gunthers and Habermas are mentioned in this group but not analyzed by Lucy (2004:1-3).

²³ Other authors call these approaches “Reconstructivist” because they seek to demonstrate the internal coherence of the law and the neutrality of the judicial application: the difference among them is the criterion of coherence in adjudication. For instance, the law and economics approach has as criterion of efficiency; for Hart, coherence in “easy cases” is reached by the possibility to apply the law undoubtedly (Rodríguez G. 1999:21-3), while Dworkin privileged principles and not policies (Rosenfeld 2004, quoted by Lucy 2004:5) and justified coherence by the political morality assumed by the rules and institutions of the community (Rodríguez G. 1999: 21-3); and MacCormick considered the consequences of the ruling (Lucy 2004:5); MacCormick is considered as ‘normative-descriptive’, positioned between Dworkin (ultra-rationalist) and Ross (irrational) (Atienza 2007:107).

After this presentation of the wide variety of classifications and denominations of the normative theories of judicial adjudication, the following sections present a brief summary of those that have had more impact worldwide. As mentioned before, the proposed classification is possibly a bit oversimplifying the differences and coincidences between different currents, and does not necessarily take all nuances and overlap into account.

2.2.1 Legal positivism

In spite of its name, legal positivism is to be classified under the normative approaches because it basically prescribes how judges should adjudicate. Continental legal positivism is sometimes confused with formalism²⁴ because it also seeks to limit adjudication, to guarantee legal certainty and to privilege deductive logic as method (Atienza and Ferrajoli 2005: 24-27).²⁵ One of the most important authors of modern positivism is Kelsen whose theory has been transcendental in Latin America. In the common law system, it is mainly represented by Hart who identified three issues: the difference between law and coercion, the relationship between legal and moral obligation, and the nature of the rule (Doherty 2003:111). He created the rule of recognition, crucial for constitutional law theories (Doherty 2003:113). Joseph Raz is another important author who distinguished between law and morality and focused on the difference between legislator's and judge's duties (Doherty 2003:121). The difference between Kelsen's basic rule and Hart's rule of recognition was summarized by Doherty (2003:115) as follows: the former is a "presupposition" whereas the latter is a "fact" which needs not to be "presupposed". Raz rejected the idea that the rule of recognition is a "fact" because the acceptance to obey the law is a moral decision (Doherty 2003:127). Legal positivism is identified with a model of state with a strong conception of sovereignty, separation of powers and codification.²⁶

Four theses characterize legal positivism: First, **the discretion thesis** admits that in the presence of "hard cases" the judiciary may create new rules for the case. Kelsen accepted four situations in which judicial discretion should be accepted. First, when that law cannot be totally determined because the superior rule cannot specify all the meanings in which it should be applied (Kelsen 2002 (1960) 350). Second, when the

²⁴ The "Analytic Theory of the Law", centered on the complexity (semantics) of the language, is also considered close to this school (Broekman 1997:85-96).

²⁵ This method of reasoning is also called "subsumption" (García A. 2006a).

²⁶ The Napoleonic code is seen as the corollary of the separation of powers because it compiled general rules to solve all the cases coherently and hence, limit judicial discretion. This separation is criticized because when general rules correlate a generic case with two or more possible incompatible solutions, judges should modify the rule; when judges establish a hierarchy between rules in conflict and apply the more important one, it is a derogation, which is a typical legislative activity (Buligyn 2003: 9,24-5).

indeterminacy of the law was intentionally settled by the author of the enacted rule (Kelsen 2002 (1960) 350). Third, when the indeterminacy is not intentional, but it is due to the ambiguity of the text; so that, many meanings are possible. Legislative intention or the will of the contracting parties are the auxiliary criteria to interpret those cases (Kelsen 2002 (1960) 350-1). Four, when two valid rules are applicable to one case simultaneously but they are contradictory. There is no method that allows finding “a unique correct answer” because they can only provide one possible solution (Kelsen 2002 (1960) 351-3). Adjudication performed by the competent organ is therefore always authentic and creates law (Kelsen 2002 (1960) 354).

Hart called the indeterminacy of the law “the open texture of the law”, which should be accepted. He criticized Legal Formalism because it would disguise the need to adopt other criteria to apply the law. Particularly, he rejected the option to “freeze the meaning” of the law to make it applicable in the same way to all the cases, as well as the absolute exigency to respect standards containing precise meanings of the law. He concluded that the concrete definition in a particular case should be privileged (Hart 1961:161-5; Doherty 2003:133 and Himma: 1999:71). In “soft cases”, the language of the rules is clear in their common use. When the application of a law cannot be based on a consensus, other methods are accepted. The purpose of the rule is thereby considered as the preferred criterion to adopt when adjudicating. The intention of the legislative is accepted with a limited scope in cases of specialized knowledge (Marmor 2000:167,198,229). “Bad” judicial discretion is assimilated with arbitrariness because judges decide in the presence of one of the following situations: (i) they ignore legal guidelines established for the particular case, when they are clear and with a specific scope (“easy cases” in Hart’s theory); (ii) they motivate the ruling in opposition to the legal system; or (iii) they avoid motivating their rulings or they motivate arbitrarily (García A. 2006a:152-3).

One of the criticisms to this thesis is that between ‘hard’ and ‘easy’ cases, there are ‘intermediate’ cases that represent an important share of the total number of cases that arrive at high and Constitutional Courts. These cases may seem easy but each part may present convincing arguments (Atienza 1997a:13). ‘Tragic cases’ have also been identified as those that confront the judge with a dilemma, because any ruling would sacrifice “an essential element of a fundamental value from the legal or moral point of view” (Hierro 1995:137, quoted by Atienza 1997a:20). Therefore, a balancing of what is just and what is legally required becomes relevant (Atienza 1997a:15, 20-1). States with an ambitious pluralist social and democratic

agenda may incorporate contradictory values and principles seeking to give rights to everybody. They are recognized as potential causes of tragic cases due the expansion of rights, particularly of the ESC rights. Contradictions emerge and hence, the judiciary has to be entitled to seek equilibrium among non-negotiable values (Atienza 1997a:27).

The second thesis is the **pedigree thesis** that seeks to identify the legal validity of rules depending on “how and by whom law is promulgated” (Himma 1999:71). In continental law systems the identification of the law has not been highly discussed but in common law systems the problem refers to the legal reasoning in case law analysis, where the identification of the rule and the normative force is not clear.²⁷ The binding force of precedent in common law systems is accepted whereas civil law systems (including the Nordic) rather attribute a persuasive force to it (Spaak 2004:261-2). The procedure to find the *ratio decidendi* is not unique and in many legal systems its determination is not crucial for legal theory. What is clear is that “moral considerations tend to be relevant in case law analysis” and therefore objectivity is not possible at the level of interpretation (Spaak 2004:263,267).

The third thesis is the **separation thesis** referring to the separation between morality and rules (Himma 1999:82; Bobbio 1965, quoted by Hierro 2002:288-9 and Buligyn 2003). It accepts that the meaning of law “does not necessarily, or conceptually, depend on moral or other evaluative considerations” about the scope of the law in particular circumstances. This is one of the “core commitments” of Legal Positivism (Marmor 2005b:1-5). Whereas the former theses are seen as the distinctive principles of Legal Positivism vis-à-vis other legal theories (Himma: 1999:82), this thesis generated discussion between inclusive and exclusive legal positivists, referring to the acceptance of moral values in the determination of the law in some circumstances (Marmor 2005b:1-5). Inclusive positivism or “soft positivism” accepts that validity criteria of a legal system may contain moral values (Hart 1994:247, quoted by Hierro 2002:290; Doherty 2003:123; Himma 2006). Critics of this vision argue that legal validity may depend on moral judgments, but when this moral value was included in a constitution (rule of recognition) there is no difference with exclusive positivism (Hierro 2002:291-2).²⁸ Exclusive positivism, represented by Raz, argues that judicial

²⁷ That is why the *ratio decidendi* and *obiter dictum* were designed in Common Law systems (Spaak 2004:261-262).

²⁸ MacCormick is sometimes included here although his theory, based on Hart's theory is also seen as a theory of legal reasoning (Atienza and Ferrajoli 2005: 29).

discretion may sometimes consider moral values. The inclusion of moral principles with universal scope in positive law does not mean that positivist methodology should be reevaluated (Hierro 2002:298).²⁹

According to the fourth thesis, the **social thesis**, “the law is essentially a means” of social control; the social rules of a particular society determine the scope and contents of the law (Marmor 2005b:5).

Legal objectivity, highly defended by the positivist school, is not generally accepted. This objectivity may be reached “at the level of the sources of the law”, but not “at the level of interpretation and application of the law”, because the first is a factual exercise whereas the second implies a moral reasoning (Spaak 2004:253). Legal objectivity is considered relevant vis-à-vis the duty of the judiciary to adjudicate by applying the existing law and not by creating new law. However, this hypothesis is valid in a scenario of the “separation of powers doctrine” (Spaak 2004:253). On the interpretative level, Spaak identified four main types of arguments, depending on the relevance of the elements of legal interpretation and using the ranking of the moral values involved in each method as a ‘solution’ to rank the arguments in the discussion: (i) textual arguments focus on the literal meaning of statutes and take as most essential value *predictability*; (ii) systemic arguments focus on consistency and coherence in the legal system and promote the values of *consistency* and *coherence*; (iii) intentionalist arguments focus on legislative purposes and the value is the democratic underpinning; (iv) teleological arguments rank statutory purpose as the most important, and *rationality* and *legislative efficiency* are the core values (Spaak 2004:260-1).

In the Hispanic world, Carlos Alchourron and Eugenio Buligyn represent Legal Positivism, supporting the view that judicial decision should be justified by the deductive logical method (Atienza and Ferrajoli 2005). Formal logic is considered an important part of Legal Positivism: it seeks to avoid arbitrary justifications in rulings (Soeteman 1981, quoted by Broekman, 1997:18). Non-formal logic or ‘legal logic’³⁰ is opposed to formal logic, because the latter uses “deductive and compelling arguments”, whereas the former refers to arguments which only may aspire to convince. When legal logic accepts a legal argument, it depends on associations and/or analogies. “This allows empirical research of legal reasoning (which type of arguments are generally accepted and so on) but it prevents rational analysis of legal reasoning” (Soeteman 2003). In judicial adjudication the relevance of formal logic is explained as follows: when someone does not agree

²⁹ On inclusive and exclusive legal positivism, see Spaak (2004:257-8).

³⁰ Legal Logic rejects Natural Law theories. It includes the analysis of computability, the creation of judicial models and statistics (Broekman 1997:105-8).

with a conclusion, he has to disagree with at least one premise, but “when an argument is not reconstructed as deductively valid, there are hidden commitments with the proponent”; in those cases someone may disagree with the conclusion without disagreeing with any of the premises (Soeteman 2003). In legal logic the inconsistencies of Positive Law do not cause the “total collapse of the legal system”. However, in the legal practice, deduction is difficult because any legal rule can be defeasible and therefore, legal practice involves “a limited knowledge (which) results in plausible but defeasible conclusions”. As a conclusion, formal logic is not very pertinent for legal reasoning but cannot be replaced by legal logic based on arguments (Soeteman 2003).

Contemporary theories reject the thesis of legal positivism and highlight the problems of indeterminacy of the law and the relations between law, morality and politics. They are also called post-positivism (Calsamaglia 1998:209). They are not seen as a refinement of positivism but as a shift of interest from “soft cases” to concentrate mainly on “hard cases”, which cease to be considered as exceptional. Precisely, the decline of legal positivism is attributed to its lack of capacity to provide enough persuasive criteria to solve “hard cases”, while just denouncing as a fault when judges do not follow the law (Calsamaglia 1998:215). Post-positivists reject judicial discretion as presented by legal positivism, as well as the theses of social sources of the law and separation (Calsamaglia 1998:210-9). Some schools use the skills of other disciplines to try to solve “hard cases”, whereas other schools are skeptical about the possibility to find general and abstract theories that may be standardized to solve them. For those schools, adjudication replaces legislation as the core content of legal theory (Calsamaglia 1998:210-3).

2.2.2 Theories of legal argumentation and Neo-constitutionalism³¹

Theories of legal argumentation, Neo-Constitutionalism³² or Theories of Legal Reasoning, are all denominations of the school based on the balancing or weighing method in constitutional and statutory interpretation and rejecting formal logic as the way to adjudicate. It is supported by the Jurisprudence of Values³³. It is known as “new (neo) constitutionalism” because it is linked to the emergence of new constitutions in the second half of the XX century, which contain an important number of principles besides

³¹ For a historical overview of the main theories of legal argumentation, see La Torre (2002).

³² The aim is to actively protect constitutional rights and the moral obligation is to comply with the law if the law complies with the Constitution. Representative authors include Zagrebleski and Nino (Comanducci 2002:100; Pozzolo 1998:339). It was defined by its main characteristics: “(a) a written, entrenched constitution, (b) a charter of rights, and (c) a review mechanism to protect rights” (Stone-Sweet and Mathews 2008:85-6).

³³ It influenced German Constitutional Case Law, highlighting the value choices underlying the law that permit to choose the best options (Shiffrin 2006:217).

rules. It aspires to give legal validity to all the constitutional principles involved in a particular case (Carbonell 1998:210).³⁴ These theories are also called principled theories because consistency and coherence are considered the most important elements of adjudication (Spaak 2003:240).³⁵ Dworkin³⁶ and Alexy are considered the main authors of this movement.

The quality of rulings relates to the correctness of the evaluation of values, interests and social progress involved in the process. The Jurisprudence of Interest and the American Sociological School of the beginning of the XX century are catalogued as antecedents of this approach. The jurisprudence of interests considered the balancing method as neutral, exempt of ideology, whereas the American Sociological School³⁷ considered balancing as a form of “social engineering” (Bomhoff 2008:19-20). Other influential schools include Natural Law³⁸ (Atienza and Ferrajoli 2005: 47-60; Pozzolo 1998:339), the Theory of Discourse (Broekman 1997:111-6), the Jurisprudence of Topics of T. Viehweg, the New Rhetoric of Perelman, and the informal logic of Toulmin³⁹ (Broekman 1997:108-10; Atienza 2007).

Judicial adjudication is seen as a combination of the analyses of the sources of the law, hermeneutics and the relationship between morality and law (Prieto 1997:8,15-6, quoted by Carbonell 1998:208). The ‘rule of recognition’ proposed by Hart is questioned because legal discourse is replaced by moral discourse in justifying judicial decisions (Pozzolo 1998:339-42; García A. 2006a). The traditional method of rulings control, i.e. checking its conformity with the law, is replaced by a control of ‘proportionality’, in which the quality of the ruling depends on the quality of the argumentation and not on the conformity with the law or its effects (“control of motivation” instead of control of judgment). The role of Constitutions is supposed to help in the transformation of social relations, besides the control of political powers and guaranteeing

³⁴ Earlier, Kelsen promoted the creation of constitutional courts, but he privileged the role of the legislator vis-à-vis the judiciary and the executive (Prieto 2000:167). His model excluded cases involving concrete interests or facts, and hence, only referred to the constitutional analysis of statutes, rejecting the use of principles in it (Gascón 1994:64, quoted by Prieto 2000:169).

³⁵ Another denomination is ‘Interpretivism’, considered a third way between natural law and legal positivism (wikipedia.org/wiki/Interpretivism).

³⁶ He sustains that legal systems have two levels, a superficial, consisting of the valid positive norms, and an axiological, which supports the first one. Judges are supposed to know both stratum and thus, they always take the right decision, which is not the exercise of judicial discretion or judge-made law because the rule would be applied in a retroactive way (García A. 2006a).

³⁷ Pound recognized the relevance of standards in case law. Pound and Esser contrasted standards with principles. Standards are defined as “a rule of judicial discretion, as an aid for case-by-case reasoning”. They were taken-up again by Dworkin who distinguished between law, legal principles, policies and standards and pointed to the moral character of the majority of them. Although they are sometimes used as synonyms, standards are differentiated by their character as guidelines for the argumentation, and because the application of principles is obligatory whereas it is facultative for standards (Riedel 1991).

³⁸ Radbruch, in particular, influenced Alexy, whereas Habermas and Fuller influenced Dworkin. Finnis is also considered as one of the most influential theorists of this movement (Atienza and Ferrajoli 2005:47-60).

³⁹ The last three theories were also classified as Legal Logic (Broekman 1997:108-10; Atienza 2007).

individual rights.⁴⁰ This approach limits the role of the legislator and gives supremacy to the judge, who does not only protect fundamental rights⁴¹ and constitutional principles but also the general order, justice and the empowerment of civil society (Frydman 2007:7). The myth of the rational judge replaces thus the myth of the rational legislator (García A. 2006a). This mainly European School is considered as having influenced the creation of the European Courts of Justice and Human Rights and of the modern national Constitutional Courts (Frydman 2007:6,8).

The distinction between rules and principles is attributed to Josef Esser in the 1950s, but Dworkin is recognized as the principal mentor of the discussion (Alexy 2000a:294). The acceptance or rejection of those principles defines two currents in modern legal theory: one recognizes that principles are “optimization commands”, another current only shares the rejection of the principle theory. The “optimization character” is the distinctive characteristic of principles vis-à-vis rules and promotes the optimization of actions “to the highest degree that is actually and legally possible”. Principles are therefore considered more appropriate. Rules are defined as “norms that can only be either complied with or not” and are denominated as ‘definitive commands’ (Alexy 2000a:294-5,300). Principle theory is considered relevant for the determination of the scope of rights (Alexy 1996:249, quoted by Alexy 2000a:299) and the ‘Theory of Constitutional Rights’ of Alexy is recognized as the most important contribution to this school mainly because of its development of the theory of balancing, the distinction between rules and principles and the characterization of this procedure as a ‘meta-constitutional rule’ (Stone Sweet and Mathews 2008:94-5).

Another important aspect of this theory is the distinction between context of discovery (detection) and context of justification. The latter is the only relevant context and refers to the provision of arguments that support the ruling but without explaining them. The way judges reached their decision (their motivations) does not matter; in other words, a value-based decision is rational when the procedure that is followed is valid independently of the contents (García A. 2003:53-6; Atienza 1997b). This view has been criticized. One problem, for example, is that the justification is contingent and particular and, therefore, cannot be logically analyzed (Nettel 1996:115-8). Another problem is the choice of ‘the major premise of the syllogism’, i.e. how to find (or create) the rule (Spaak 2003:236-7), because premises should not

⁴⁰ The European Convention of Human Rights (6) defines the warranties of an equitable procedure, and is the most quoted judicial recourse used before this court (Frydman 2007:9).

⁴¹ Through the theory of the ‘constitutional block’ (Favoreu and Rubio 1996, quoted by Cea 2005:47).

necessarily be taken from the positive rule (Alexy1989:220, quoted by Prieto 1991:186) because principles and case-law are valid too (Prieto 1991:190).

Several essential concepts are introduced in the analysis of adjudication. A first concept is **consistency** and refers to the judicial duties of respecting the law in force and of adjusting to the reality in proof matters (Atienza 2007:117). A second concept is **coherence** which –according to Dworkin- should guide the justification of judicial decisions (Dickson 2001; Marmor 2000:87). Coherence is defined in different ways and with different nuances.⁴² The principle of coherence has been considered methodologically complex, because the explanation of how hermeneutics is guided by value judgments with solid foundations does not bear in mind that everything is possible in hermeneutics (Marmor 2000:97). Hence, the principle supposes that judges interpret and not invent because “all the interpretative elements seem to depend on the proposed value” (Marmor 2000:113-4). A third concept is **reasonability** and refers to the exercise of judicial discretion. The ‘reasonability test’ should be applied to laws: if they do not respect constitutional rights, they should be struck down. A huge discussion exists about whether this test is a legislative competence or whether the constitution has conceded these competences to the judiciary (García A. 2007:15-6; Prieto 2000:170-1). The principle of reasonability is also linked to the due process of law as proposed by the US Supreme Court, to test the correct enactment and the justice content of laws (Orunesu 1998:328-9).

A fourth concept is **correctness** of constitutional adjudications from the perspective of the meaning of the constitutional rules. One of the methods proposed in this respect is the method of ‘Essentially Contested Concepts’ (ECCs) proposed by Gallie (1956, quoted by Iglesias 2000). The ECCs have a complete value dimension, and an argumentative nature; they are standards and social goods with a complex structure, which require the use of different criteria to establish their meaning. The higher the conceptual complexity, the higher the probability will be of disagreement about them. Many constitutional ‘hard cases’ may involve

⁴² Sometimes it is considered as the relationship between particular moral judgments and principles (Günter 1995:274). According to Alexy, it refers to the pretension of correctness of a normative decision, i.e. when it is rationally justified in the framework of a legal system (Günter 1995:296-302). According to Dworkin, coherence in judicial decisions is reached by interpreting the law as “speaking with one voice”, i.e. rights and duties must be interpreted as if they were enacted by one “single author, the community personified”. This is qualified as implausible by authors like Dickson (2001) and Günter 1995:301). Raz and MacCormick linked legal interpretation with legal justification based on a “coherent set of principles or values” (Mac Cormick 1984; Raz 1994a, quoted by Dickson 2001). However, MacCormick went further and classifies judicial reasoning in arguments of coherence, consistency and consequences. The first two do not determine the ruling whereas the last one is crucial; a calculation of the effects of a ruling is accepted to evaluate the welfare or “preference satisfaction of the whole community” of the majority of them (Lucy 2004:5).

undetermined rights or 'ECCs' and hence judicial discretion is accepted (Moreso 2000:111; Iglesias 2000:79-83, 86). An agreement on the correctness of an argument is reached when it is shared without ignoring the difficulties of the interpretative method (Iglesias 2000:97-8). The admission of ECCs in Constitutions implies the admission of the indeterminacy of constitutional norms and, therefore, the admission that interpretation is the expression of a particular belief. This conclusion is rejected from a democratic point of view (i.e. the "counter-majoritarian" objection to judicial adjudication). But a response to this critique is that any context of disagreement is a context of indeterminacy and therefore, justified constitutional judicial arguments should be accepted because the correctness of the adjudication depends on arguments and judging based on them (Dworkin 1994, quoted by Iglesias 2000:101-2).

This approach has been defined in diverse ways, on the basis of its underlying hypotheses:

- (i) Legal systems are composed by norms and principles, which are considered as moral values with a positive status. The fact that contemporary constitutions⁴³ include a vast number of vague and abstract principles makes it easier for constitutional interpretation to apply directly the constitution and to use as much as possible those principles in adjudication. The law is not violated because it is dynamic.
- (ii) It facilitates the integration of law, morality and politics.
- (iii) Subsumption is replaced by balancing because principles need a special method of interpretation with explanation and justification of the decision as their most important elements. Interpretation is the most important component of the law and it is considered as part of it.
- (iv) The legislative is limited by the conditions of the validity of laws, established by constitutional principles and rights. As a result, when a law does not respect a constitutional principle or value, this law cannot be upheld. This perspective differs from the Kelsenian model, where the constitution was the natural law that the legislator would have to adequate and develop.
- (v) The judiciary has to adequate the law to constitutional regulations, while respecting its principles. It should also take similar decisions in the future, respecting "the principle of universalizability" and if judges change parameters, they should again be justified. As a result, equity is reached when an exception is applied without contradicting universality, i.e. when it covers all the potential exceptional cases (Pozzolo 1998:339-42; Spaak 2003:247-8; Atienza 2005:67-73, 2007:116; García A. 2007:11-5). A difficulty of the universalizability principle is the identification of two "*relevantly similar*" cases because they are not completely similar. This principle is not sufficient to justify a decision but it is seen as a valid method of

⁴³ The most remarkable examples are the German (1949), Italian (1947) and Spanish (1978) constitutions (Carbonell 1998:208).

choice “between two or more universalized norms” (Spaak 2003:248-9). It is a method that supports “formal justice” and hence, it may favor legal certainty (Spaak 2003:248-52).

Ideology is considered as indispensable for constitutional adjudication because it is concerned with the social and economic effects of rulings and seeks social consensus. Therefore, this school finds itself between ideology and law and is included into the consequentialist approaches (Prieto 1991:182,198).⁴⁴ The ideology of Neo-constitutionalism was considered as necessary to guarantee constitutional rights vis-à-vis the power of the State, because the State has to justify public restrictions of rights (Comanducci 2002:91; Prieto 2004:61). It is seen as a concurrent theory of Legal Positivism because it supports the constitutionalization or ‘positivization’ of a catalogue of fundamental rights and principles, changing the paradigm of interpretation, and strongly influencing the legal order. A valid rule is a rule that has been enacted correctly but also that does not violate constitutional rights (Carrió 1981:39, quoted by Moreso 2000:117-8; Moreso 1998). The school also uses the concepts of ‘normative emptiness’, when no rule exists to solve the case, and ‘axiological emptiness’, when a rule exists but the interpreter thinks that it is unjust or when the constitutional rule is considered unjust (Orunesu 1998:326).

The core content of this approach is the use of the ‘balancing method’, which is essential in constitutional adjudication. It aims at solving disputes between rights, legitimate public or state interests and/or other constitutional principles. It is building on the growing role of constitutional rights and the judiciary at the cost of the traditional superiority of the legislative (Stone Sweet and Mathews 2008:74-5, 85-7; Uprimny and García 2001). Balancing replaced the use of logic (subsumption) in the application of positive rules, although the structure of the subsumption method is seen as similar to the structure of the balancing (or weighing) method. However, subsumption employs the logic whereas balancing works in a similar way as arithmetic, but instead of numbers, it employs judgments, weighing, degrees of interference, and confiability. Subsumption classifies whereas balancing graduates, but both methods are considered necessary to obtain good legal reasoning (Alexy 2003:448). It is also argued that this method allows a plausible argumentation when judges should decide between a value and contradictory constitutional rights (Prieto 2004:55).⁴⁵ Balancing is however strongly criticized because, first, it lacks autonomy and depends on the outcomes of legal interpretation. Second, it uses the same method of subsumption with other

⁴⁴ Provided that civil law countries used to be more formal because of the high influence of legal dogmatic, consequentialist reasoning has found many obstacles (Spector 2003:257-8; Del Granado and Mirow 2005:5).

⁴⁵ Prieto (2004) performed an analysis of the method in the Spanish constitutional case law.

terminology and less argumentative rigor (García A. 2006b:119-20). And third, it allows declaring a law invalid on the basis of a constitutional principle, despite of its constitutionality, which is a situation that may be arbitrary because of the existence of many contradictory constitutional principles (Prieto 2000:184-5).

Balancing is linked with two principles: rationality and fairness. Rationality is supported in Europe (mainly by Alexy) but also in the US (by David Beatty and Frank Easterbrook) where it is known as the 'rational basis review'. Notwithstanding, in the US it does not have the same influence as in Europe. In the US, fairness and proportionality are linked with constitutional procedure and concrete warranties, whereas in Europe they have the status of general principles mostly applicable in human rights adjudication but influencing the whole legal system (Bomhoff 2008:21-5). Balancing as rational activity is developed without a normative framework, based on valuations that not necessarily lead to an inter-subjective agreement (Prieto 2000:181). It supposes that the judiciary acts as the legislative, creating hierarchies among rights and interests and regulating its application and interpretation through the construction of precedents. Defenders argue that it is a better attitude than affirming a plain constitutional interpretation. The core question that remains is the establishment of clear procedures to adjudicate (via precedents) and their publicity to allow citizens to know them (Stone Sweet and Mathews 2008:88-9).

Balancing is a method that applies the 'principle of **proportionality**' to adjudication. It theoretically involves four tests, that refer to: (i) the legitimacy of the public measure that would affect rights, (ii) the suitability or adequacy of the means to achieve the public policy or objectives, (iii) the necessity of the intervention, i.e. there are no other options to avoid the limitation of rights ("least restrictive means" test), and (iv) the "balancing in the strict sense" where the benefits of the policy measures are weighed vis-à-vis the rights limitation (Stone Sweet and Mathews 2008:76-7; Prieto 2000:180). Proportionality in the narrow sense refers to the higher realization of the possibilities from the legal point of view; it seeks to empower the "balancing law", formulated as "the more intensive the interference in one principle, the more important the realization of the other principle" (Alexy 1996:146 quoted by Alexy 2000a:297-8). The method provides a selection and a hierarchical organization of principles from an axiological perspective; this classification applies only to a particular case, and therefore, it depends on its (particular) interpretation (Guastini 1996, quoted by Pozzolo 1998:339-42).

The test of necessity corresponds to the 'strict scrutiny' test in US case law, where it is one of the most controversial issues of judicial review (Stone Sweet and Mathews 2008:79-80). Summers developed a typology of arguments from an analysis of US Supreme Court case law (considered in this thesis for the case law analysis). This method of interpretation seeks to avoid that arguments are in contradiction and therefore, the balancing procedure is accepted (Summers 1997:110-7,122).⁴⁶

Another analysis considered judicial discretion as a formal principle subject to weighing by judges. It is based on the three scenarios suggested by Alexy's theory concerning the relation between constitution and legislature (Alexy 2002b:391, quoted by Klatt 2007:515), but it applies to the relation between judges and the law. In the first scenario, the law does not provide specific prohibitions to the judiciary, i.e. discretion is unlimited. This is 'the pure procedural model of judicial discretion', defended by the 'radical skeptic perspective' which ignores the enforcement of rights. In the second scenario, the 'pure substantive model', the law limits all the possible decisions impeding discretion. This corresponds to Dworkin's 'theory of the only right answer'. The third scenario, the "substantive-procedural model", is located in-between the previous two scenarios. Hart's theory of hard and easy cases fits in this scenario, because this model states that some decisions are 'prescribed', others 'prohibited' and others are 'neither prescribed nor prohibited'. Discretion is called the 'sphere of judicial freedom' or 'structural discretion' and is limited by "what the law definitively commands or prohibits" (Alexy 2002b:310,396, quoted by Klatt 2007:516). 'Epistemic- structural discretion' refers to its sources and depends "on the type of knowledge to which discretion is related", i.e. empirical or normative. The former refers to the facts and the latter to the law applicable to the case. The epistemic perspective of discretion is applicable to different instances in a process: lower courts have empirical discretion and higher courts normative discretion (Klatt 2007: 516-7). The balancing method sees judicial discretion as a formal principle because it lacks substantial content, but helps to know "how content is to be established" and "who is entitled to establish those answers" (Klatt 2007:516-8). Its scope is "to be settled in a (dynamic) balancing procedure", depending on arguments and "principle-theoretical insights", depending in each case on the balancing process (Klatt 2007:527).

⁴⁶ He highlighted the tendency to follow a general methodology to adjudicate, identifying as basic elements: (i) the purpose of the methodology; (ii) the definition of selected classes of interpretative arguments; (iii) the general procedure to interpret them; (iv) the evaluation of each type of argument focusing on the ways of potential violation; (v) the justification of the superiority of any kind of argument; (vi) the rules to solve conflicts among the types of arguments (Summers 1997:118).

Neo-Constitutionalism has received many criticisms. The competence to decide the scope of rights seems to be the core of the discussion. Legal Positivism prefers legislative competence whereas Neo-constitutionalism prefers judicial competence, which means that constitutional interpretation is superior to the constitution itself (García A. 2007:15).⁴⁷ Legal positivists do not find any reason to conclude that judges know more about constitutional law than legislators and therefore, balancing between constitutional rights performed by judges should not have more authority than the one performed by legislators (García A. 2007:12). Another criticism focuses on the scope of constitutional rules, containing values, principles or rights which are generally undetermined. It is not possible to demonstrate that only judges know the true scope of those principles and values. On the contrary, legal positivists seek to control only those laws that expressly violate the semantic of constitutional rules, rejecting the nullification of rules for axiological reasons (García A. 2006a:170-2, 2007:2-4). Ideological Neo-constitutionalism increases judicial discretion and diminishes legal certainty through the balancing method to interpret constitutional principles and by the “moral” interpretation of the constitution” (Comanducci 2002:106; Moreso 2000:108). This method shifts the core content of argumentation from real reasons to reasons of justice in each case (García A. 2007:11). Theoretical Neo-constitutionalism failed because, first, the judiciary as a whole does not know an objective morality; on the contrary, present societies show moral pluralism. Second, a coherent system of precedents is not plausible because the judiciary is not coherent with its own decisions over time. Third, judges do not always argue and decide rationally; vague principles help judges to find *ex post* justifications to their decisions, increasing the indeterminacy of the law, because the balancing method does not offer a stable and general hierarchy (Comanducci 2002:107-8). Moreover, this method seeks to adapt the law to social changes, providing general parameters to other authorities, influencing social reforms and promoting judicial auto-attribution of normative competences (Jori 1980:5, quoted by Comanducci 2002:107-8). Therefore, the issue is the control of judges, because the protection of rights does not depend on the law anymore but on the moral interpretation of judges (García A. 2006a:170-2). However, as defense it is argued that the link between morality and law puts in evidence that “extreme injustice is not law” and therefore it is an important challenge to legal positivism (Vigo 2003:224).

2.2.3 Legal Skepticism: Legal Realism and Critical Legal Studies Movement

⁴⁷ In Spain, Neo-constitutionalism justifies that the Constitutional Court acts as judge of last resort in the *amparo* actions while the Constitution did not provide this competence (García A. 2007:11).

Although these schools are not normative in a strict sense because they do not propose any interpretative method, they are presented here because they defend an axiological skepticism and attack the principle of legal certainty and legal dogmatism. Skeptical theories seek to explain *a posteriori* the implicit behavior of judges. They support the complete indeterminacy of the law and the relevance of ideology in adjudication (Atienza and Ferrajoli 2005:38-47). Legal Realism, Marxism and the Critical Legal Studies Movement (CLSM) are considered skeptical theories. The Sociology of the law, with Marxist roots and with Pound as its principal author, focuses on the gap between law in theory (in books) and law in action (Doherty 2003:187-202). Boaventura de Souza, who belongs to the sociology of law and, particularly, the legal pluralism school, has had a strong influence on Latin-American legal theory with his hypothesis that the theories of legal argumentation are rhetoric (Atienza and Ferrajoli 2005:64-5).⁴⁸

The core content of Legal Realism is law in practice; it concentrates on the tasks of courts, not on legal norms (Doherty 2003:205-11). Three main branches were identified: the North American, the Scandinavian⁴⁹ and the Genovese branch. They recognize an absolute judicial discretion to adjudicate. The choice of the interpretation method depends on the interpreter, and hence, there are no 'correct' interpretations; the law is the one that is applied by judges. In turn, the executive has also discretionary competences to apply the sentences, and therefore, legal certainty is affected (Marti 2002:259-82).

The term "realism", from the skeptical perspective, seeks to show the limits of the law, which push sometimes judges to make choices, in some cases "manipulating legal rules and precedents", and in some cases biased by personal beliefs. According to Realism, judges can adjudicate under the influence of their political views, although pretending to follow a legal approach (Tamanaha 2008:2-3, 69). But 'realism' means also that judges may produce reliable decisions taking into account social and institutional context, recognizing that those rulings are not perfect and not warranted (Tamanaha 2008:2-3). A historical analysis identifies realism as its goal "to improve the predictability of law", and as considering "judging as a fraud" (Tamanaha 2008:6).⁵⁰ This school is also called the 'heretical approach', with more influence in North

⁴⁸ Faria (2000 and 2001) and García-Villegas are authors of the Legal Sociology School in Latin America.

⁴⁹ This approach has had little influence in Latin American jurisprudence.

⁵⁰ The evolution of the American Legal Realist school was summarized as follows: In the 1960s they criticized rulings of the Warren Court, and defended "their liberal values as constitutional values"; in the 1970s and 1980s CLSM presents its thesis, and from the 1990s onwards, a new skeptical realism questions the legitimacy of the judicial review and supports the link between law and politics (Tamanaha 2008:6).

American than in Europe.⁵¹ Some authors recognize a limited level of 'predictability' and legal certainty because when the judiciary adjudicates, it has a limited number of justificatory strategies. The choices of judges are seen as a combination of personal beliefs and the 'values and assumptions' of the group to which they belong. The difficulty of justifying rulings is basically due to: (i) the huge amount of precedents and interpretation methods that facilitate a personal choice; (ii) the indeterminacy of values that facilitate the arbitrary choice of judges; (iii) the ideology that hides the real reasons of a ruling (Lucy 2004:9-13).

Legal Realism attacked Legal Formalism because it rejects that adjudication may be based on 'neutral and abstract legal concepts'; although it recognizes a sort of scientific objectivity vis-à-vis the choice of the 'best' policies for the society. The CLSM rejects the latter affirmation because contradictory values are always present and, therefore, the choice of the judiciary is one of the possible political options. As a result, law is politics and not an objective science (Shiffrin 2006:181-2).

CLSM⁵² is considered as a product of Legal Realism, but with more radical theses against Legal Positivism (Broekman 1997:116-20). Its hypothesis is that adjudication has a political character because ideology and arguments of public convenience ('policy arguments') are currently used in constitutional adjudication and law is completely undetermined (Rodríguez G.:62-88; Atienza and Ferrajoli 2005:64-5). Ideology is defined as an "universalisation project or textual mediation between the individual interests and universal claims of a social group" (Kennedy 1977(sic 1997a):42-3, quoted by Siltala 2003:125). Judges are accused of behaving strategically because they seek to impose their personal convictions under the "false veil of formal legality". The three strategies that are identified are 'constrained activism', 'difference splitting', and 'bipolarity in adjudication'. The first strategy promotes their personal ideologies but does not violate the law; the second promotes an intermediate point between two extreme positions, and the third is a combination of the preceding strategies (Siltala 2003:127-8).

CLSM argues that judge-made law was more developed in the US than in Europe because, by using policy arguments, the judiciary has been more active in the political arena there (Kennedy 1997b:360). This generated an "internal academic critique of legal reasoning" because American judicial adjudication "is

⁵¹ In Europe some authors are mentioned, such as, M. Van de Kerchove, F. Ost and C. Joerges; in the US, Trubek, Unger, D. Kennedy, Kelman and Singer (Lucy 2004:7).

⁵² For a historical overview of CLSM, see Kennedy (1992). For a criticism of this movement, because of its excessive skepticism and its lack of new methods of interpretation, see Calsamiglia (1992).

under heavy suspicion of being disguised ideology”, whereas in the European legal culture the case is different (Kennedy 1997b:365-6,374, 376).⁵³ One of the heritages of Legal Realism is the “critique of the assumed ideological neutrality of judicial decision making in hard cases”, because they imply the choice between “two ideological camps present” and therefore, adjudication is an issue of “policy” which can always be controversial from an ideological point of view (Kennedy 1997b:367; 369).

In France, the “*Théorie réaliste de l’interprétation*”, under the leadership of Troper defended also a skeptical conception of adjudication and challenged the legal dogmatic approach. It is linked to the Genovese realism of Tarello, Guastini, Comanducci and Mazzaresse⁵⁴ (Pfersmann 2001:236-8), which works with the hypotheses of the indeterminacy of the law and the absolute judicial discretion (Martí, 2002). Although they haven’t had a direct influence in Latin America, they are related with some tendencies in contemporary Spanish legal thought and, this way, they have permeated Latin American legal culture. For the French theory, judicial discretion allows choosing the applicable law, defining its meaning, and (non-democratically) creating new rules (Troper 2003:56). In modern democracies, the legislative and judicial powers are equivalent because both enact general rules (Troper 2003:75). Even when judicial decisions seem illogical, they are valid in the legal order, and therefore, theories of the ‘single correct answer’ do not matter because those ‘incorrect’ rulings are also valid (Troper 2003:56).⁵⁵ Judicial motivations give an illusion of normativity, by arguing that adjudication is rigorously deducted from the constitution. But the validity of the rulings does not depend on the justification but on the constitutional competence of the judiciary to adjudicate, and as a consequence, they are authentic, independently of their contents (Troper 1978:295,299).

The “Narrative coherence of the law” approach, is also considered as part of skeptical movements; the aims currents are: (i) Law and Literature, connected with the CLSM, bases its analyses of jurisprudence on studies of form and structure in literature (Broekman 1997:125). (ii) Legal Semiotics seeks to demonstrate that “the distinction between interpretation and decision-making is conceptual and not merely contingent”⁵⁶ (Jackson 1996:235). Legal Semiotics criticizes Dworkin’s confusion between interpretation and adjudication, because it confuses academic and judicial semantics, putting together two separate concepts:

⁵³ CLSM has debated with other schools, including Law and Economics, supporting distributional arguments rather than efficiency arguments. For an in-depth analysis of its criticism on Law and Economics, see Eastman (1999:761).

⁵⁴ Literal interpretation and its supposed objectivity in protecting the principle of the legal certainty is questioned because of its ideological character (Mazzaresse 2000).

⁵⁵ For a critique of the French Constitutional Court, see Troper (1999:139).

⁵⁶ “Law and Critique” is the journal of this movement. Somewhat contradictory it has been linked with Legal Positivism, Natural Law and Legal Realism (Broekman 1997:128-9).

meaning and interpretation (Jackson 1996:236). The qualification of a case as “hard” does not depend on legal reasons, because it is an intuitive judgment that depends on common sense (Jackson 1996:243). In the same way, the context of discovery of an “easy” or a “hard case” depends on “the sense of the situation” and not on “the sense of the words”, which is an issue of the context of justification (Jackson 1996:244). Common sense is important in solving “hard cases” because if they are complex from the perspective of the legal doctrine, they may be solved with the help of “their less technical, narrative underpinnings” (Jackson 1996:255). The task of Judicial behavior is to give “the appearance of legality” and to convince that “the rules of the game are being followed” (Jackson 1996:277).⁵⁷

Finally, jurimetrics is also relevant here. This perspective was created by Loevinger in 1949, by promoting scientific investigation (following the methodology of natural sciences) of legal problems through the use of symbolic logic and computers (Doherty 2003:212-3). They accept technical analysis of the law to show that there is more behind judicial decisions. They influenced CLSM and Law and Economics and challenged the orthodox judicial decisions methods (Doherty 2003:216-7). Judicial behavior analysis is part of these approaches but provided its positive approach it will be developed in the second part of this chapter.

2.2.4 The institutional theory of legal interpretation

The institutional perspective bases its analysis on the interpretative capacities of the three branches of power, and on the way consensus is reached when interpretative disagreements exist (Sunstein and Vermeule 2002:3). The interaction between the judiciary and the legislative is the core content of this approach, particularly the design of judicial review understood as a way to stimulate constitutional debate and dialogue (Friedman 2004:1296). The aim is to solve the conflict between those who promote the supremacy of one of the two branches through the “balancing” of the empirical outcomes on the capacities and weaknesses of each power (Farrelly 2008:221). Judicial politics, thus, ought to be part of the adjudication analysis because cases of “disagreements, non-compliance with agreed-upon rules, and political conflict” occur inside the judiciary (Farrelly 2008:223). Judicial review is considered as an intermediate point “between legislative and judicial supremacy”.⁵⁸ The promotion of inter-branch dialogue assumes that the judiciary does not have better skills than the legislative to use the ‘balancing method’ in fundamental rights matters and that the judiciary does not have enough skills to establish the financial

⁵⁷ These approaches have had little influence in Latin American Constitutional Courts. The same is true for the Deconstructive Approach which rejects a coincidence between language and meaning that justifies interpretation (Broekman 1997:129-32).

⁵⁸ This argument is also defended by Waldrom, Tushnet and Kramer (Farrelly 2008:224).

consequences of the regulation of rights; in some cases, the executive capacities are considered superior (Holmes and Sunstein 1999:94, quoted by Farrelly 2008:230). “A dialogical judicial review” emerges as the best option to harmonize constitutional principles with public policies (Farrelly 2008). Inter-branch dialogue is also supported by some justices because the other branches of power may restrict the judicial power of adjudication, provided that it lacks enforceability competences (Ginsburg R.B. 2004:194; 199). Therefore, a way to obtain compliance of rulings is to decide only situations that are “likely to be obeyed”, because in absence of concrete skills of enforcement, rulings obedience is a “political habit”. It also increases the perception of respect for the judiciary and the inter-branch “cooperative equilibrium” (Law 2006:50-1).⁵⁹

Judicial review analysis is therefore the main issue of institutionalism. It is defended as a way to control political powers and to defend individual rights. The policymaking role of courts becomes relevant, always linked to the role of the other branches (Ginsburg T. 2004:226-9). The pertinence and convenience of judicial review has therefore mainly been developed from the perspective of law and politics, which is known as the “judicialization of politics”, due to the frequency by which some public policies are taken-over by the judiciary (Uprimny 2007). The judicialization of politics is seen as a way to promote accountability among powers, although in countries with a weak rule of law it may affect judicial independence (Domingo 2004:7; Couso 2005:44-5). In general, the relevance of judicial review depends on the “comparative advantage” of courts vis-à-vis the legislative in determining the meaning of the constitution (Tushnet 2008b:51-2). The design of judicial review seeks also to solve disputes “among multiple lawmakers”, avoiding usurpation of competences and, to protect individual rights against the actions or omissions of the state. Arguments in favor or against judicial review depend on “whether one sees pervasive denials of fundamental rights in modern liberal democracies with Legal Social States weaker than those in other liberal democracies”, i.e. they depend on the personal perspective vis-à-vis the “establishment” (Tushnet 2008a:24-5).

The rights discourse is therefore a central feature of the institutional analysis of judicial review. One point concerns the specialization of courts to rule cases concerning rights. Disagreements on the scope of rights is now the rule and therefore, they should be the object of a “political philosophical” debate, avoiding the “interpretation in a narrow legalistic sense” (Waldron 2006:1367). This does not mean that judicial review is

⁵⁹Judicial review of US policy decisions has been qualified as of marginal value because the Court lacks of the same empowerment as the executive and legislative to protect itself and to enforce its decisions (Abraham 1998:368, 371)

incorrect in all the cases, but only that “rights–based judicial review” is seen as democratically incorrect, because the problem is not the legislative capacities to regulate them, but the fact that citizens “disagree about rights”, which is not the same as rights being violated. Legislative procedure seems the best procedure to solve the debate, with a participation of courts before the enactment (*ex ante* control), because judicial review cannot solve institutional failures neither (Waldron 2006:1406).

‘Strong-form judicial review’ may be convenient when there is no discussion on one specific constitutional meaning, whereas ‘weak-form judicial review’ should be preferred when uncertainty exists about the clear meaning of a constitutional rule (Tushnet 2008b:66-7). ‘Strong judicial review’ refers to systems where courts can avoid the application of a statute, modify its effects according to the regulation of individual rights, or “strike a piece of legislation out of the statute-book altogether” (Waldron 2006:1354).⁶⁰ This form of judicial review is based on the following arguments: (i) judges are elected in accordance with the Constitution and therefore represent a democratic power. (ii) Rights would not always be respected and therefore, judicial review is necessary to correct the “failures of democratic institutions” (Waldron 2006:1401) by promoting fundamental rights and by protecting the rights of minorities against majoritarian decisions (Friedman 2004:1268-9).⁶¹ Strong judicial review is favored by contexts where the “informational and electoral environment is dense”, public opinion respects the judiciary, and the conflicts with the legislative are low. As a result, “unitary political systems” with strong political coalitions may strongly weaken independent constitutional review” (Whittington 2003:473-4). But the protection of minorities is not necessarily the main goal of this action, but “to ensure that political competition yields socially desirable legislation”. This perspective takes the interaction of political parties in the Congress and the potential influence of pressure groups into account, because this interaction may produce “inefficient and unfair” statutes. The judiciary should therefore limit those arrangements, without obstructing “efficient and fair statutes” (Posner E. 2008:24).⁶²

Arguments against ‘strong judicial review’ affirm that: (i) Although the judiciary is supposed to have capacities to analyze moral concerns of rights, it may distort the rights discourse due to their interest in

⁶⁰ This case seems more common in Europe than in the US (Waldron 2006:1354).

⁶¹ Strong judicial review is favored by theoretical ideas like Dworkin’s ideas on the correct answer and their implications in terms of the ‘comparative advantage’ of interpretation (Tushnet 2008b:51-2).

⁶² In US, criticism against judicial review “usually occurs when the court has opposed significant political movements that seek to use federal power to address a pressing social problem, whether it be slavery, the nationalization of the economy and society, or economic depression”. In more recent times, criticisms are the consequence of some blockages of the “modern regulatory state” (Prakash and Yoo 2003:89).

developing their “own doctrines and precedents” (Waldron 2006:1359). (ii) The rights empowerment by courts deviates them from a focus on relevant conflicts of citizens about rights, to centering the attention on “side-issues about precedent, texts, and interpretation” (Waldron 2006:1353). The growing relevance of the “constitutionalization” of the law (Favoreu 2000:52-6) increases these attempts of the judiciary to control other powers in the name of the protection of individual rights (Couso 2004:30; Nogueira 2003:63). (iii) Courts lack political legitimacy and legislative competences, violating “the principles of representation and political equality” to solve conflicts of rights (Waldron 2006:1353; Posner E. 2008:20) being an inconvenient “mode of final decision-making in a free and democratic society” (Waldron 2006:1348). Judges are accused of replacing legislators and imposing their own positions (Gargarella 1997:59-60) which, in some cases, could well be those decisions that the Congress apparently did not want to take (Palacios 2001b:8), thus obstructing the will of peoples (Friedman 2004:1268-9). (iii) This case law is the basis of new jurisprudence with global impact; new hypotheses like the unconstitutionality by omission when the other branches do not provide certain goods and services, constitute an excess of competences of courts at the cost of the legislative (Sagüés 2004:6). But judicial review is also justified as a form of power, mainly when “the other organs of government have failed to fulfill their own responsibilities” (Abraham 1998:371).

Notwithstanding, judicial bias is not seen as a sufficient reason to attack judicial review, because other elements as judicial and legislative competences, the political relations in Congress and the influence of public opinion are also important elements to make the action relevant for democracy (Posner E. 2008:27). Institutionalism proposes the “Thayerian regime of judicial review” which allows the judiciary to enforce only “clear and specific constitutional texts”, excluding constitutional rights (Farrelly 2008:224-5). As a result, ‘weak judicial review’ may be implemented when: (i) “the possibility of a range of reasonable specifications of general abstract rights” is accepted, and (ii) the “comparative advantage” of the judiciary in interpreting the constitution “is relatively modest”. The evaluation of the institutional capacity of other branches to interact with the judiciary in constitutional matters is therefore highly relevant (Tushnet 2008b:79).

An analysis of the US case suggests that the three branches have enough capacities to perform constitutional interpretation and therefore, ‘weak-forms of judicial review’ are plausible (Tushnet 2008b:96,157). As a result, courts should not have the monopoly of constitutional interpretation (Epstein 2006:1315). The legislative would respect “judicial independence in the exercise of judicial review” if it is favored on the basis of a political cost-benefit analysis. The potential sanctions that the legislative can

adopt against judicial independence are not necessarily taken on a case by case basis. In 'weak-form judicial review' the possibility of overriding rulings is a valid way to sanction courts. But this action may have a high political cost, so that the legislative may choose to respect the ruling although it does not share it.⁶³ In the US, Legal Formalism or Textualism is recommended to courts, for institutional convenience, whereas administrative agencies may have more flexible interpretation competences due to their specialized character (Sunstein and Vermeule 2002:3-4). The procedure that administrative agencies must follow to develop legislative delegation allows the participation of interested persons and presents neatly the purposes of the regulation; courts should only correct the failures of agencies (Molot 2007:30-2). In Germany, in contrast, most of the literature analyzing the 'judicialization' of the legislative work highlights the importance of constitutional case law and its normative character in policy-making (Stone-Sweet and Mathews 2008:111). The Canadian regime is presented as an example of institutional design, because "it avoids large discretionary competences to both powers seeking equilibrium" (Farrelly 2008:228).⁶⁴ However, the theoretical assumptions of the model should be empirically tested (Farrelly 2008:228) and apparently, it has not been frequently used (Whittington 2003:464-5; Tushnet 2008b:51-2).⁶⁵

Theories of authority are recommended to guide the choice of the interpretation methods and to reach an agreement among institutions (Sunstein and Vermeule 2002:25). The quality of the institutions matters because when the judiciary is corrupt or lacks academic and intellectual capacities, or when the legislative is highly competent to interpret the constitution, judicial review may not be convenient (Sunstein and Vermeule 2002:37-9). In the US for instance, the increasing influence of law clerks on the US Supreme Court rulings has been seen as a progressive institutional handicap of the judiciary vis-à-vis the institutional capacities of the legislative (Posner 2005b:75). Other institutional disadvantages of the judiciary vis-à-vis the legislative are their lack of representativeness and their lack of capacity to understand important

⁶³ In US constitutional law, a veto on a Supreme Court adjudication nullifying an act of the other public branches is very difficult and almost impossible. Judicial review in the US was synthesized as follows: a non democratic organism, i.e. not politically responsible, orders an elected organism that they cannot govern as they intend (Ely 1980:4-5, quoted by Marmor 2000:220).

⁶⁴ The Canadian constitution includes requisites "under which legislatures can limit Charter rights by law". This rule is seen as a result of the adoption of the balancing method by the Court and it is known as "The Oakes Test". It also includes the 'notwithstanding clause', which in certain circumstances allows the re-enactment of a law declared previously unconstitutional by the Supreme Court. This clause has practically not been used, due to its political consequences. It is also seen as a form of dialogue between the legislative and the judiciary in rights matters, and hence, neither of them has the last word in rights adjudication (Farrelly 2008:228-9; Law 2006:56; see also Tushnet 2008b on Canada's weak form of judicial review).

⁶⁵ Other examples of 'weak forms' of judicial review include: Great Britain and New Zealand (Tushnet 2008b). In Great Britain, courts cannot strike down statutes but can state that they are incompatible with the European Convention on Human Rights (Human Rights Act 1998, quoted by Law 2006:56).

sources of legislative information (Posner 2005b:77). Some perspectives on judicial review in the US identify 'Departmentalism' with a sort of "weak form of judicial review" (Tushnet 2008b:16).

"Departmentalism" also defends the possibility that each branch of power acts "on its own constitutional views" promoting inter-branch discussions and "shared responsibility for interpretation" (Johnsen 2004:109). The three branches have the responsibility to defend the Constitution which implies a "highly context-dependent approach", supported by two principles: (i) each branch of power must defend the Constitution as a whole, including the duty of respect of the constitutional competences of the other powers, and (ii) the legislative and the executive should avoid to defend their personal views on specific topics, but simply support the 'best' interpretation. Constitutional interpretation is thus a "collaborative enterprise" and "each branch should recognize its own limitations and the relative strengths and functions of the other coordinated branches" (Johnsen 2004:109; Prakash and Yoo 2003:88). The challenge is the establishment of a hierarchical order of interpretative competences and the development of non judicial interpretation based on standards and processes supporting "principled constitutional decision-making by the political branches" on all constitutional themes, including those with a high volume of judicial doctrine (Johnsen 2004:113,116). This proposal favors consensus and promotes a "less court-centered constitutional culture" (Johnsen 2004:123; see also Friedman 2004:1290-1). The supremacy of one branch and the strong separation of powers complicate inter-branch collaboration in constitutional interpretation, harms the recognition of the "own institutional limitations" and eases the potential violation of the other branches' constitutional competences (Johnsen 2004:120).

Inter-branch constitutional debate would improve constitutional interpretation, and would "increase awareness and attention by academics, the press, interest groups and the public" (Johnsen 2004:134). Dworkin's proposals on the only right answer are rejected because they ignore the institutional constraints of judges. Static theories of statutory interpretation as Textualism and Purposivism support "Congress supremacy", whereas dynamic or pragmatic theories may favor judges' biases (Volokh 2008:39). This perspective is not "skepticism about moral or political arguments" but seeks to weigh judges' limits (Sunstein and Vermeule 2002:40, 47-8).

2.2.5 The Textualism approach

This school privileges the use of the “ordinary meaning of the language” and interpretation should only be allowed when statutes are not clear enough.⁶⁶ Textualism seeks to “eliminate *ambiguity* and thereby to yield a *single correct answer*” (Molot 2007:46). It pretends to be a method which is politically neutral, protecting the arrangements produced by the legislative (Easterbrook 2004:262). It also pretends to be based on ‘neutral principles’, avoiding the use of constitutional ideology by the interpreter, this way, the “original meaning” of the text is found (Treanor 2007:493-4). The “argument from authority” defended by Justice Scalia states that judges do not have legal competences to promulgate new laws, because they would usurp legislative competences, as judicial activism does (Scalia 1998:23,133; Philipse 2007:173; Gray 2007:9).⁶⁷ Textualism rejects also the use of legislative history because it does not provide “an authoritative indication of a statute’s meaning”⁶⁸ (Scalia 1998:29-30). This opinion coincides with public choice theory, qualifying legislative work as “messy and full of compromises, some principled and some unprincipled” (Molot 2005:23). It is also opposed to the “living constitutionalism” movement, particularly developed in US, because it is not plausible to reach an agreement on the “guiding principle of the evolution” to be applied in constitutional interpretation (Scalia 1998:45-7). Although Originalism and Textualism are frequently used as synonyms, the latter distinguishes itself by the rejection of legislative history (Treanor 2007:543).⁶⁹

Textualism argues that the control of the legislative procedure, including promulgation, guarantees the clarity of the text. “Purposivism”, as an interpretative technique, is rejected because it ignores these constitutional procedures, privileging “un-enacted legislative intentions” to modify statues (Manning 2006:73-4). Textualism can thus be considered as a post-realistic movement seeking to avoid the risks of an excess of Purposivism (Molot 2005:21, 2007:49-50). Textualism promotes the semantic meaning and the legislative supremacy, because this branch has the prerogative to “set the level of generality at which they wish to express their policies”, and hence, policy context should be evaded by the judiciary, privileging “dictionary definitions, the use of identical language in other statutory provision, and ‘textual’ or ‘linguistic’ canons of constructions” (Manning 2006:92-3, 99, 110; Molot 2007:45-6). Legal formalism is considered as appropriate to limit judicial discretion, avoiding Purposivism and the use of legislative history in

⁶⁶ On the evolution of textualism and its antecedents, see (Molot 2005).

⁶⁷ Textualism rejected the vision that the adjudications of the Warren and Burger Courts reflected more justice’s personal values than the majoritarian will (Treanor 2007:495).

⁶⁸ He added that legislative history is highly influenced by “the Washington lawyer-lobbyists” who, in many occasions, succeed to insert their opinions in committee reports (Scalia 1998:34).

⁶⁹ But other authors distinguish two types of originalism: Textualism, focusing on texts, and Intentionalism, focusing on the original meaning of the text through legislative history (Philipse 2007:173).

hermeneutics (Molot 2007:9). Simultaneously, it defends measures to avoid that the judiciary limits discretionary competences of other authorities. This position is called “judicial minimalism” and aims to reduce as much as possible the intrusion of the judiciary in politics.⁷⁰ But this minimalist position may impede the judiciary to comply with the duty to “reconcile their decisions with existing legal materials” (Molot 2007:53).

This movement received many criticisms. First, it is argued that the interpretative task should not be “the imposition of one’s personal preferences or values under the guise of constitutional exegesis”, that interpretation is a very complex exercise, and that it is difficult to identify the ‘best’ method. Textualism as well as Dworkin’s moral philosophy, is mistaken on the certainty of their conclusions about how to interpret a constitutional text (Tribe 1998:71-2).⁷¹ Textualism is challenged to accept some disagreement on the meaning of legal texts and to accept, in some cases, the balancing method and the analysis of legislative purposes and context (policy consequences) (Molot 2005:55-6). A scientific methodology of statutory interpretation is possible but its complexity implies that a diversity of perspectives should be accepted, provided that there are no unique rules to solve particular cases (Philipse 2007:191-2). According to Pragmatism, interpretation always involve the author’s intentions and therefore, it “is not a theoretical issue, but an empirical one”, and hence, the method has “to look for evidence and make arguments” rather than seeking for a method of interpretation (Fish 2005:21-2).

Second, despite its appearance of objectivity, it is qualified as part of the “neo-conservative conception of the regulatory state”; it is accused of promoting an “ideological agenda that seeks to reduce the state and its regulatory functions to the necessary minimum”. The judiciary is asked to avoid correcting the failures of the legislative (Marmor 2005b:3-6), because it seeks that unregulated cases remain like that. This is the minimalist approach, accused of obstructing “the moral obligation of the court” to apply justice to the concrete case and to create “binding precedents” to facilitate the application of the law (Marmor 2005b:10-1). ‘Easy cases’ normally do not reach higher courts whereas ‘hard cases’ are frequent due to the ambiguity or the vagueness of some terms. If the judiciary limits its work to the ‘ordinary meaning’ it may affect the expansion of public regulatory policies because many laws may not be applied as a result of a conflict in courts (Marmor 2005b:16).

⁷⁰ The term was adopted by Sunstein (1996, 1999), and by Tushnet (1999). See also, Molot (2007:16-9).

⁷¹ Tribe (1998:94) argues that for constitutions like the one of the US, which have been promulgated a long time ago, it is highly improbable to identify the original meaning and scope of the constitutional text.

Third, textualism should accept the plausibility of a conflict among methods of interpretation, and that in some cases courts “have applied the contrary principle that a single term or phrase in a single statutory provision may have multiple meanings”, called “the polymorphic principle” (Siegel 2005:1,3). It is accepted (i) to avoid undesirable effects of a ruling when it is a matter of policy, (ii) when “a court disagrees with a prior case interpreting a statute, but desires to adhere to the case as a matter of precedent”, and (iii) to correct previous errors to further applications of the specific interpretation, named *stare decisis* polymorphism (Siegel 2005:26,29). This method attacks textualism’s argument that “a single phrase in a single statutory provision has a single meaning”, because it violates the parameters of the judicial task, and naïvely pretends to control judicial choice (Siegel 2005:30,35,41-3). The Congress may reject this principle through legal definitions (Siegel 2005:57-9).

2.2.6 Normative Law and Economics

Law and Economics, or economic analysis of the law (EAL), is a vast and complex sub-discipline, which is difficult to summarize. EAL theories have been classified in many ways. Coleman, for example, distinguishes between analytical and normative theories. The analytical approach includes the descriptive and positive perspectives. The first refers to the use of the efficiency principle to explain legal rules and judicial decisions and the second defends the capacity of market models to create a framework in which legal problems may be analyzed. The normative approach evaluates positive laws and proposes reforms based on economic efficiency (Coleman 1988:67-8, quoted by Gonzalez A. 1994:935). Posner (2004c) distinguishes between heuristic, descriptive and normative theories. The first seek to show the coherence of doctrines and legal institutions. The second aim to “identify the economic logic and effects of doctrines and institutions and the economic causes of legal change”. And the third provide guidelines to the judiciary and other authorities on the most efficient methods to regulate social conducts (Posner 2004c:67).

Another conception of EAL defines it as a heterogeneous approach which works with “analytical techniques and values of economic analysis either for explanation or for prescription”. In the first case, it seeks to develop models to explain human activity, including legal institutions; in the latter case, it seeks to apply economic principles to the decision-making processes of legal institutions and to shape “the permissible scope of interactions among legal persons” (Brion 1999:1042). The explanatory perspective (positive analysis) focuses on the interaction among individuals and within public institutions, assuming that persons

seek “the rational maximization of personal utility” (Cooter and Ulen 1997, quoted by Brion 1999:1042; Shiffrin 2006:190). Human interaction is qualified on the basis of the “efficiency in the allocation of resources to productive activity” (Brion 1999:1043). Although institutional analysis (from an economic perspective) also analyzes human relations, and looks at wealth maximization, it differs from EAL in its focus on institutions instead of markets as places of interaction, as well as in its evaluation of the “efficacy of institutions in minimizing the transaction costs inherent in economic action” (Brion 1999:1044). The prescriptive (normative) approach of EAL focuses on “constitutional provisions, legislative enactments and judicial doctrine”. The aim is to provide the “basis for choices made in legal processes, particularly in the judicial process” (Brion 1999:1044). Normative EAL defends the reduction of the State and individualism, and hence, the main issues are property, tort and contract law. The judiciary has as role “to mimic the market in the resolution of disputes” (Medema 1993; Calabresi and Melamed, 1972, quoted by Brion 1999:1045).⁷² Heterogeneous approaches in EAL include also the pragmatic school⁷³, which defends the employment of values to solve controversies (Brion 1999:1054).

The method of EAL is defined as “a coherent and refutable theory of legal rules, processes and institutions”, which should be empirically tested (Krecké 2004:422). It is argued that the method and its achievements should be evaluated on the basis of “the range of problems which are successfully handled by the discipline” (Rubin 1985:29).

Law and Economics is considered as a skeptical theory, being influenced by Legal Realism and CLSM, with a critical view on legal dogmatism (Broekman 1997:120-1; Horwitz 1980:905, quoted by Hierro 1994:948). In the following paragraphs, a brief summary of the discussion between EAL values and legal theory values is presented, whereas the positive literature on judicial behavior will be developed in the next section of this chapter. A central issue is the relation between efficiency and justice (Parisi 2004:5; Coleman 1988 quoted by Gonzalez A. 1994:930; Hierro 1994:946). This discussion refers to the debate between legal theory and the so-called new law and economics approach, as opposed to the so-called old approach whose main author is considered to be Calabresi (Calabresi 1983:86, quoted by Hierro 1994:949). The latter referred to economic analysis applied to situations in which the legislation seeks to

⁷² Within this perspective several approaches are distinguished, the Chicago school, which does not consider wealth distribution as an important criterion (Brion 1999:1045); the Yale school which considers wealth distribution crucial for social welfare (Rose-Ackerman, 1985 quoted by Brion 1999:1046); and CLSM (Brion 1999:1046-7).

⁷³ Pragmatism has obtained an independent status from EAL and is, therefore, developed later.

satisfy some well defined economic objectives, whereas new theories use economic methods to explain and criticize the law even when they do not have an explicit economic objective (Horwitz 1980:905, quoted by Hierro 1994:948). Distribution is a crucial point in the discussion: sacrifices in terms of efficiency should be compensated by distributive gains in order to reach a just society (Calabresi 1980:558, quoted by Hierro 1994:958). Calabresi concludes that a junction of efficiency (volume of wealth) and distribution is not the same as justice, but it may help to reach it (Hierro 1994:955). In short, efficiency and distribution are both equally important parts of justice (Parisi 2004:19; Polinsky 1985 quoted by Bayón 1994:974).

The relevance of this discussion is related to the formulation of laws to promote efficiency, as a component of the notion of justice, because a wasting state is not a just state (Calabresi 1985:227, quoted by Hierro 1994: 958).⁷⁴ This shows tensions between the concepts of utilitarianism of EAL and the Legal Social State in Rawl's theory of justice (Spector 2003:245).⁷⁵ In contrast, the concept of "commons" (*collective patrimony*) does not support the axiological perspective (distributive justice, equity and constitutional allocation of competences) because of its susceptibility of being captured by pressure groups. The conceptual and institutional basis of fiscal management seeks to solve some issues: (i) the identification and interpretation of the commons and the competences to interpret as regulation, (ii) the most efficient way to protect the commons, and (iii) the competences to objectively indicate the process to protect and enlarge the commons (Wiesner 2004: 5).

Precisely, a relevant school inside EAL is the public choice analysis of the influence of interest groups on the interpretation of statutes. The hypothesis is that the legislator can hide the right objective of a law (to benefit some interest groups), thereby increasing the information cost and creating problems for the interpretative function of judges who then formulate a justification based on public interest and disguise the redistributive intention of the law (Posner 1998:498-9). General interest is seen as a fallacy because an ideal situation in which a constitution "advance(s) the interests of all citizens" is almost unrealistic, because democratic design produces winners and losers and public competences to tax and spend create incentives for groups to organize themselves to control those powers in their own benefit (Mueller 1999:119). The distinction between parametric rationality (considering only the preferences of the persons or the group of persons) and strategic rationality (also considering the preferences of the others) helps in

⁷⁴ A concrete application of this issue is the debate about whether contractual law is a better way to obtain justice than taxes and social security measures, because of its lower administrative costs (Kronman 1980, quoted by Bayón 1994:976-8).

⁷⁵ Rawls supports the traditional mechanism of redistribution, relevant for the social sectors regulation (Bayón 1994: 978).

the analysis of the accomplishment of legal norms through incentives, and is typical for the public choice approach (Calsamiglia 1989, quoted by Gonzalez A. 1994: 932-3).

2.2.7 Dynamic Interpretation and Legal Pragmatism

William Eskridge is considered a pragmatist, although his theory is called “Dynamic Legal Interpretation”. Statutory law is principally purposive and the elaboration of these purposes is performed by different institutions in different periods of time and in different normative and factual contexts (Eskridge 2002:3). Dynamic interpretation, based on the public choice, anti-positivism and anti-pluralist theories, concluded that the legislator has many limitations which the judiciary can rectify or complement under the parameters of the rule of law. Eskridge classifies theories of legal interpretation as: (i) those that follow “statutory purposes and seek overall coherence”; (ii) the pragmatic ones that use several normative theories and consider the consequences of judicial decisions as relevant; and (iii) the hermeneutic ones which are based on arguments from the theories of legal interpretation. Dynamic interpretation by judges and the executive should be sequential and hierarchical; it should take into account different perspectives, particularly the plain text, legislative history and precedent, systemic and teleological arguments to avoid “to be overridden by subsequent actors”. This way, interpretation reflects equilibrium among the powers of the different branches. The more recent is a legal text, the less dynamic is its interpretation. When statutes pretend to regulate comprehensively a topic, they may have an “open texture”, and thus, dynamic interpretation is recommended, not for technical reasons but for normative reasons, i.e. to accomplish the goals of the legislator (Eskridge 2002:7-12, 35-6; Stack 2004:15-6). The main thesis is that judicial adjudication should be compatible with the “changing social, cultural and political circumstances”, as well as with other legal arguments (Spaak 2003:239). It involves a ‘linear approach’ because legal text and legislative history usually have priority with respect to the dynamic solution. That is why it is called ‘pragmatic judicial dynamism’ (Popkin 2002:4).

It shares some principles of Textualism, except for the excessive dogmatism vis-à-vis “ambiguous text”, to which it pretends to give “plain meanings” and its opposition to the “modern regulatory state” (Eskridge 2002:15).⁷⁶ It also differs from Textualism in the recognition of several competences of the judiciary including: (i) the integration of economic regulations in the context of public law; and (ii) the supervision and

⁷⁶ In the US, dynamic interpretation promotes: (i) judicial interpretation of civil rights statutes, adapting them to the present circumstances, and (ii) interpretation by agencies, under the control of courts, to avoid potential “abuses”. For a comparative analysis of interpretation practices of agencies vs. courts (Eskridge 2002:17,20).

improvement of “public choice dysfunctions” in the political process to protect under-represented groups (Eskridge 2002:22-3). Dynamic interpretation recommends a “political calculus” when adjudicating, to obtain legal meanings that are coherent with “current political preferences” (Stack 2004:38). Social values and the opinion of the other public branches have to be considered in adjudication as the institutionalist approach recommends (Stack 2004:38,52). But the institutionalism of Vermeule rejects the second competence of judges because they rule “under uncertainty”, and hence, best practice is the formalist procedure (Eskridge 2002:23). Another criticism to this approach is the “countermajoritarian difficulty”. Its defenders argue that the constitution does not prohibit judicial lawmaking and that “there are a range of ways in which our system departs from a norm of majoritarianism” (Schacter 2002:4). A final criticism is that it idealizes the capacities of the judiciary to interpret and that it minimizes those of the other branches, and that it does not consider the possibility of ‘judicial error’ when the judiciary ‘updates’ statutes, instead of the legislator (Sunstein and Vermeule 2002:16-7).

Legal pragmatism has received quite some attention. Some authors see it as a further development of Legal Positivism (Broekman 1997:92-6), but the majority considers it as a new manifestation of the “positive perspective” of legal realism because law is related to context (Tamanaha 2008). It is also linked to legal realism, CLSM and EAL (Krecké 2004:422).⁷⁷ Legal pragmatism privileges empiricism, placing the emphasis on the consequences and considering consensus as the main criterion for the justification of a ruling. Consequences include not only those for the parties in the process but also the so-called ‘systemic consequences’, because the mere consideration of facts may bring the system to a great state of uncertainty. Law is seen as an instrument to solve conflicts or to obtain social objectives. Latin countries have not been influenced by this method, which is precisely perceived as one of its problems, because it is considered as “the only possible legal theory” (Atienza and Ferrajoli 2005:79; Posner 1999, quoted by Shiffrin 2006:188; Posner 2005a:308).

This approach does not accept the existence of “absolute moral truths” and therefore they cannot be the basis of political and legal philosophy (Shiffrin 2006:186). Although it is considered as a philosophical movement⁷⁸, its justification is based on the needs and idiosyncrasy of the US legal system. Its main author is Posner. He defines “[p]ragmatism [as] [...] looking at things concretely, experimentally, without illusions,

⁷⁷They share the ends but not always in the means (Krecké 2004:429).

⁷⁸ For a historical summary of the philosophical bases of pragmatism, see Posner (2004d: 147-9).

with full awareness of the limitations of human reason, with a sense of the 'localness' of human knowledge, the difficulty of translation between cultures, the unattainability of 'truth', the consequent importance of keeping diverse paths of inquiry open, the dependence of inquiry on culture and social institutions, and above all the insistence that social thought and action be evaluated as instruments to value human goals rather than as ends in themselves" (Posner 1993b:465 2002, quoted by Krecké 2004:430). The main theme of this theory is "pragmatic adjudication", which has aiming at higher judicial conscience of systemic consequences of the rulings as its core, rather than the general or theoretical concepts and the particular effects of the rulings (Posner 2004d: 149-50). The most important criterion of adjudication is the "reasonableness with reference to social policy", which is understood as everyday reasoning, privileging an empirical approach. It does not invoke the constitution to interfere in social practices, i.e. the use of abstract moral and political theory is avoided in judicial rulings. It may privilege rules over standards when "systemic consequences dominate case-specific consequences", highlighting that Legal Formalism lacks the means to guide judicial discretion. However, pragmatism does not qualify itself as a consequentialist perspective, because it does not analyze actions in function of the significance of its effects. Restrictions to judicial discretion are supported because the judiciary has a limited capacity to process information and must respect constitutional competences of other branches of government. Judicial discretion is catalogued as a policy decision rather than a legal deduction, because law is "policy science" and precedent is seen as a way to increase legal certainty and not as an "ethical duty"; in the same order, historical perspective is useful to identify whether a "current legal doctrine may be a mere vestige of historical circumstances". The creation of legal doctrine via precedent should prefer the narrow scope of the ruling, considering the limits of empirical judicial knowledge (Posner 2004d: 150-2).

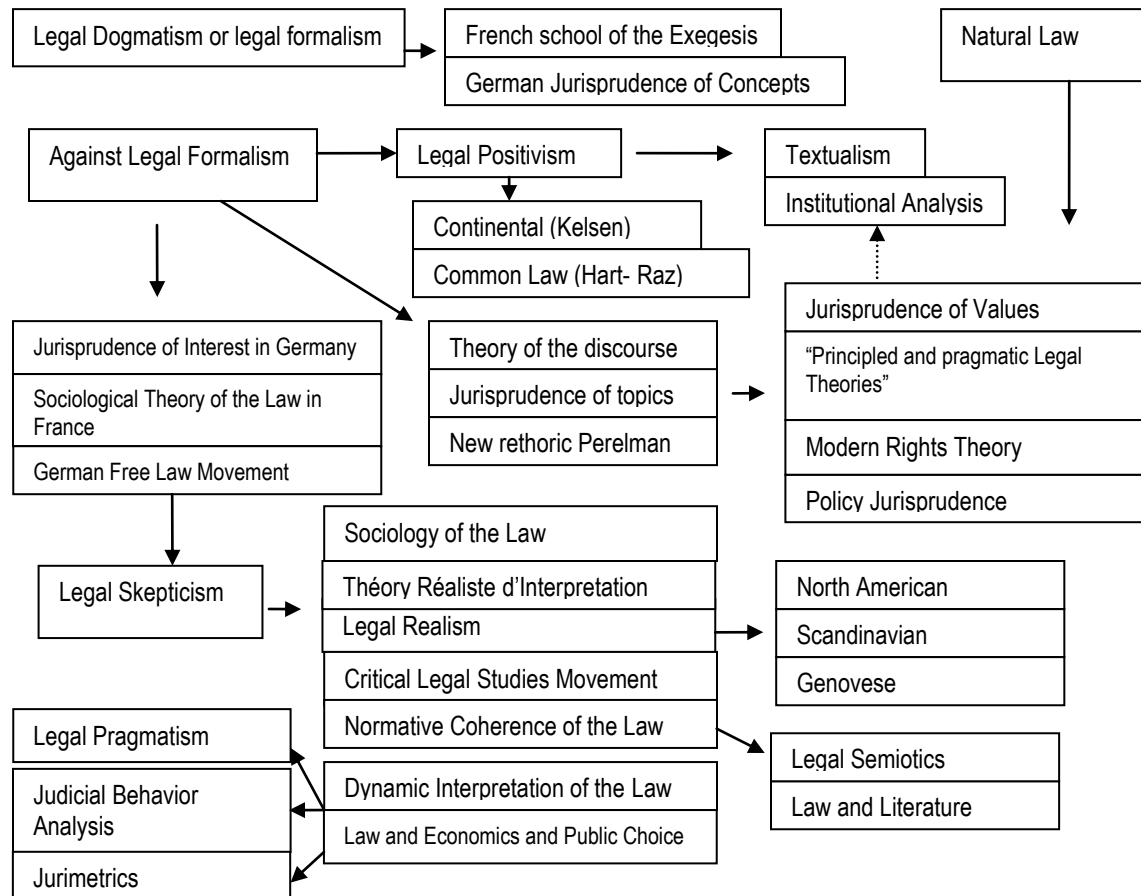
The methods accepted as valid for guiding interpretation are those of "empirical enquiry", as is the case in economics. However, normative EAL is replaced by its pragmatic version, in which "economic analysis identifies the consequences of legal decisions but leaves it up to the judge or other policy maker to decide how much weight to give to those consequences in the decision-making process" (Posner 2004d:151-3,156; Krecké 2004:431,434). A pragmatic court is seen as a "tolerable form of political court" because it takes a "modest" approach to "political judging" (Posner 2005b:90-1). Considering that courts are political when judging constitutional issues, the "subjective character [and] insecure foundations" should be recognized (Posner 2005b:102).

Pragmatism seems thus to be close to the institutional approach because it recognizes that in some circumstances, depending on the judicial and legislative institutional capacities, Legal Formalism may be “the pragmatically best course of action”. Notwithstanding, it is accused of neglecting institutional constraints that influence judicial discretion (Sunstein and Vermeule 2002:21-3). Pragmatism is also defined as an eclectic approach which privileges results over norms (Spaak 2003:240). There is a skeptical approach to theories of legal interpretation; they are not considered as the main guidelines to adjudicate, but a combination of contextualism and instrumentalism is preferred. Grey defined the school as a “theory about how to use theory” which may favor compromises (Grey 1991:13, quoted by Spaak 2003:255). Another qualification of the method is the preference for “the best decision under the circumstances”, using a combination of instruments (Farber 1988:1332, quoted by Spaak 2003:258). But Pragmatism is supposed to make EAL more realistic, useful and practical because “legal decision-makers” are not seen as “rational optimizers”, because they do not have real capacities of “observation, deliberation and analysis” (Krecké 2004:427). Pragmatism is also supported by some justices, particularly because it offers the possibility of using different interpretation methods (literal, linguistic, precedent, purpose or consequences) (Breyer 2004:201-3), and takes into account the particular circumstances. Purposive approaches are more democratic, because judges recognize legislative competences of the Congress, and therefore, potential subjectivity is minimized (Breyer 2004:211).

A first criticism of this method argues that it gained “realism and common sense” but lost “coherence and predictability” and therefore it lost relevance for legal policy (Krecké 2004:435). It is seen as a more realistic approach to understand the legal process than “the mechanical social efficiency model elaborated by the economic analysis of the law”, showing that traditional instruments of EAL should change (Krecké 2004:436). According to a second criticism, it seems to give the same relevance to the context of discovery as to the context of justification and therefore it may be confusing the two processes (Spaak 2003:260-261). Finally, its excessive subjectivism produces uncertainty (Krecké 2004:428).

Figure 2.1 seeks to visualize the previous description of normative approaches to judicial adjudication. This is not the only way to present the theories because, as explained before, although a personal effort was made to be ‘objective’ in this presentation, the description of these theories constitutes also an exercise of interpretation.

Figure 2.1 Legal schools on judicial adjudication (normative perspective)



2.3 The positive perspective on judicial adjudication

Judicial behavior is the core content of this approach, and its relevance is growing due to the closeness between continental and common law systems and due to the increasing relevance of the judiciary in both systems (Cea 2005:48-53). The positive analysis of courts seeks also to fill gaps of constitutional theory, which encounters the following problems: (i) As a normative theory, it seeks to influence adjudication and support “social reforms through judicial action”; (ii) Some constitutional theories have a strong moral influence⁷⁹ (Posner 2004b:216); (iii) It limits empirical knowledge of the judiciary, being close to academia but far from the judiciary and the legal practice (Posner 2004b:217); i.e. legal practice and empirical consequences as judicial activism or workloads are highly relevant and little analyzed. Dworkin’s perspective that “cases in which facts or consequences matter for sound constitutional decision-making are

⁷⁹ Constitutional principles are seen as “substantive political principles” but not directly part of the public policy process (Posner 2004b:219).

'rare' is not shared (Posner 2004b:221). In short, the courts lack empirical knowledge of the cases and over-estimate constitutional theory (Posner 2004b:224).

Positive (i.e. descriptive) theories of judicial behavior seek thus to explore adjudication. Judicial behavior analysis refers particularly to those decisions where legal uncertainty exists because legal formalism has had difficulties to solve those cases. Therefore, other elements may influence adjudication as ideology, emotions, experiences etc. (Posner 2008:11). Different approaches seek to fill this gap, being the economic theory of judicial behavior the most comprehensive. However, this approach is being reformulated by the pragmatic theory of judicial behavior, which emphasizes the consequences of adjudication (Posner 2008:35-7,40).

In the following sections, different approaches are presented, mostly as a function of the issues at stake. It complements the normative approaches to constitutional adjudication.

2.3.1 Judge-made Law and Public Choice

One of the most relevant approaches is Judge-made Law. It develops theories for the explanation of judicial behavior from the perspective of law and economics (Posner 1998; Rubin 1999:504; Carrasquilla 2001; Schneider 2001; Bouckaert 2002; Cooter and Ginsburg 2003; Bergara, Richman and Spiller 2003). Adjudication is considered to be the result of utility maximizing behavior of judges. Efficiency in resource allocation is perceived as the main factor influencing adjudication because the judiciary is supposed to be exempt of personal convictions or pressure group influence (Rubin, 1999:545; Posner 1998:489). Common law systems are considered more accurate than continental systems to promote efficiency because in the former systems "judges make law" whereas in the latter they just interpret them (Posner 1998:493). However, these hypotheses were soon contested because in both cases "judges make law", and pressure groups or particular interests are also present in adjudication. The theory of judicial incentives seeks thus to explain how judges aim to impose their preferences and personal values on the society, contrary to the former opinion. The legislative is considered to be the power that should control this judicial conduct because when judges do not adjudicate efficiently, legislators take over their field of action (Posner 1998; Carrasquilla 2001; Cooter and Ginsburg 2003; Kalmanovitz 2001:153). The efficiency of common law adjudication is also criticized because "systemic bias in the selection of disputes" by courts and the particular self-interest of litigants impede the creation of efficient rules applicable to various classes of

potential new disputes (Hadfield 1992; Cooter and Kornhauser, 1980, quoted by Brion 1999:1049). Judges are also supposed to lack sufficient skills to analyze criteria of income redistribution because they analyze only particular situations, which should be subordinated to the efficiency criterion (Rubin 1999:545; Posner 1998:492; Bouckaert 2002).

The relevance of the Judge-made Law approach in continental legal systems has been demonstrated empirically. In Germany, for instance, the Judge-made Law approach is considered as pertinent when justices apply vague law to new cases and create precedents that modify the law. This was observed from the “demand side” (legal reforms suggested to solve “unprecedented legal problems”) and from “the supply side” of adjudication (judges’ behavior).⁸⁰ These variables depend also on the costs of legal interpretation vis-à-vis the cost of law creation (Kaplow 1992, quoted by Schneider 2001), because (i) the design of precedents is normally less efficient than solving a case in a conventional way because the innovation has to convince the legal community, and (ii) the stock of precedents is considered a public good that helps every judge to solve future cases (Landes and Posner 1976, quoted by Schneider 2001). The latter study concludes that rules production is strongly related to the demand side whereas the supply side (behavioral variables) influences less court output (productivity). When justices are closely connected to academic research, the output of the court does not differ very much from that of other courts. As the demand side effects are bigger than the supply side effects in adjudication, subtle elements of incentive systems such as an internalized sense of the judges’ mission could be stronger than economists believe (Schneider 2001).

Public choice centers its analysis on the political process inside and among public institutions. Economic analysis is applied to political decision making and the theory of the State (Roemer 1994:65; Brion 1999:1043; Van den Hauwe 1999; Müller 2003; Kalmanovitz 2001).⁸¹ Public choice theory is seen as an improvement of the “conflicting normative perspectives in law and economics, at least by bringing the debate onto the more solid ground of collective choice theory”, and it is qualified as the basis of the functional approach of the Virginia school of Law and Economics (Parisi 2004:7,10-1).

⁸⁰ Judicial workload, career incentives and experience are factors that influence the production of rules (Schneider 2001).

⁸¹ The CLSM perspective, which accepts that adjudication may be influenced by politics or pressure groups, is related to Public Choice (Rodríguez G. 1999; Eastman 1999).

The Positive Economic Analysis of Constitutional Law, which explains the creation and reform of constitutional rules⁸², posits that judicial behavior is the outcome of a negotiation between interest groups (Voigt 1999a:535). The definition of their own competences by courts, which tend to aspire for more power than granted by the Constitution⁸³, is one of the more representative examples of implicit constitutional change as well as the extension of some rights not expressly regulated in the Constitution.⁸⁴ In some cases, the other political powers have reacted to those intents, by enacting laws to modify rulings or by reforming courts (Voigt 1999b:26-7). Despite the separation of powers, every branch may engage in implicit constitutional change, but the use of judicial review by judges is an advantage. The ideology of courts may show that “judicial activism” is “positively correlated with implicit constitutional change” (Voigt 1999b:29-30).

The political economy and public choice perspectives consider each change in the status-quo as a consequence of rent seeking⁸⁵, but this is not always the case. The economic analysis of legislation tries to explain the real motivation of legislators, identifying for example groups of power (Sunstein 2002:76-8). The interaction with the judiciary departs from the explanation of constitutional regulation of market exchange, necessary to create the institutional “structure that underlies a market system” and to limit state intervention that may harm market dynamics. Market intervention is only justified “when it is in the broad public interest” avoiding distortions for the “benefit of a few and at the cost of the many” (Müeller 1999:121-2).⁸⁶ However, constitutional regulation of new issues as budget allocations, economic regulation and fundamental rights is one of the potential reasons for the empowerment of the judiciary.

⁸² Explicit constitutional change and implicit constitutional change (interpretation) are the ways to reform the Constitution; the latter occurs when a constitutional interpretation is modified without modifying the text of the constitution (Voigt, 1999a:534). Other approaches share the opinion that judicial interpretation is “the main way in which constitutions change” (Marmor 2004:2).

⁸³ E.g. the Courts in the US (Marbury vs. Madison in 1805), France, the Netherlands and Denmark (Voigt 1999b:26-7).

⁸⁴ E.g. the US, European countries, and the European Court of Justice (Voigt 1999b:26-7).

⁸⁵ It is defined as the distribution of wealth via the distribution of resources through politics, instead of the production of wealth via the functioning of markets (Sunstein 2002:76-8).

⁸⁶ Public choice analyzes different related topics. One is the scrutiny of redistributive laws that seek to transfer resources from one group to another. Information as a public good and the public regulation of the information asymmetries are crucial elements in this perspective (Sunstein 2002:51-2). Some laws have a public interest objective and are carried by a large consensus, but in many cases redistributive policies may harm the more disadvantaged or benefit those that do not need it (Sunstein 2002:55); e.g. redistributive strategies in health are seen as less effective than direct transfers (Sunstein 2002:55). Another topic is the distinction between political elections and consumption elections, where the law is seen as the result of political elections created to better protect some non-negotiable values instead of non regulated markets (Sunstein 2002:59). Transfers through regulatory laws to specific organized groups is justified because it is hard to distinguish the motivation to regulate, and it may well aim at benefiting the general interest while also benefiting some interest groups. The criterion of efficiency is used to evaluate whether interest groups have permeated economic regulation, but it is not the only one (Elhauge 1991-2:55). Not all pressure groups are a distortion because they may seek a general interest except the free riders (Elhauge 1991-2:57). The use of political power for economic purposes is not always seen as negative because in the voting process a market is created in which legislators sell legislative protection to groups which can be functional from the perspective of re-election (Posner 1998:494-6).

The judiciary is supposed to adjudicate with respect for regulatory laws because judges cannot adopt interpretation strategies based on complex empirical considerations of the effects of the laws on a case-by-case basis. Neither should they try to explain the causes of regulation because they lack the adequate knowledge of the legislative process (Sunstein 2002:76-8; Cooter and Ginsburg 2003:4). Public choice has impacted the analysis of judicial behavior because adjudication may interfere with the action of interest groups that undermine the capacity of the legislative, which is more flexible and powerful than the judiciary, to distribute wealth. The judiciary is seen as inefficient for wealth redistribution (among interest groups); hence, its focus must be on increasing wealth when applying common law and statutes (Rubin 1999).

The Public Choice perspective also analyzes whether “more intrusive judicial review” complicates the action of pressure groups as many theorist argue, or, whether it may affect legislative changes (Elhauge 1991-2:34-5, 44). Some propositions sought to use judicial review as a way to control pressure groups, when justices rule against pressure group interests based on potential ambiguities of the law (Elhauge 1991-2:60). But the empowerment of judicial review as a mechanism to control bad political decisions may also obstruct good policy reforms. Moreover, pressure groups also act inside courts (Elhauge 1991-2:67-8). The influence on the appointment of justices is an opportunity for pressure groups, even more if judicial review is empowered to create rules; a political insulation of justices to avoid the action of interest groups does not prove to be the best system (Elhauge 1991-2:80-1). The trend to increase the power of judges may menace the legislative and “judges might be motivated by the desire to impose their own values and policy preferences on society” in spite of a “more politically responsive process” (Elhauge 1991-2:85-7). Based on Arrows’ theorem⁸⁷, a more intrusive judicial review is not justified, mainly because judges are not better decision-makers than legislators and they can perturb the *status quo* and the free market (Elhauge 1991-2:109). In addition, the judiciary may be sanctioned by other branches by budgetary means or by obstructing the enforcement of rulings (Landes and Posner 1975:13-4). Judicial independence (JI) is protected when the agreements of pressure groups with other branches are respected, because then they would not directly act on courts. The Public Choice approach rejects the use of general principles to strike down laws, because Courts should not assure “the consistency of the legislative product with the public interest”, but “to enforce specific interest protected by the Constitution”. Courts should not obstruct

⁸⁷ The theorem refers to the logical problems occurring in the process of collective decision-making out of a combination of individual preferences (Elhauge 1991-1992:108-9).

legislative activity; i.e. the judiciary should not enforce moral values as “neutrality, justice, or fairness” because they should enforce “deals” made by effective interest groups with earlier legislatures” (Landes and Posner 1975:26-7; Peretti 2003:92,103).

A theoretical model focused on how lobbying affects policy via judicial decision. Lobbying is thereby not directly targeting judges, but operating indirectly via the majorities in the Congress, i.e. lobbying affects the political constraints faced by the Court, and therefore influences its rulings. Some empirical evidence was found using data on Supreme Court decisions on labor law and strikes between 1935-98 in Argentina (Laryczower et al. 2005). Another theoretical model of a common law system showed that certain litigants (better informed and with interest in precedent) can influence the legal bias in precedent formation in their interest. Civil law rule-making is less prone to such legal bias (Borchgrevink 2008).⁸⁸

2.3.1.1 Empirical analysis of judicial bias and judicial discretion

The attitudinal model presented by political science, emphasizes judges’ ideology, whereas legal approaches emphasize the constraints of precedents. Many studies show that ideology is not the only crucial factor in adjudication because other variables interfere, as precedent does (Choi and Gulati 2007:11). Empirical analysis suggests that judges care about votes but also about the control over precedent creation, which implies that votes are possibly negotiated against control of precedent creation (Choi and Gulati 2007:43-44). This approach is considered the new judicial realism, criticized for its lack of theoretical basis and the risk to overestimate some facts that are not relevant and neglect other more relevant facts (Posner E. 2008:3). One of the studies concludes that an empirical evaluation of judges should involve ideology but also “judicial and legislative competence”. “Legislative competence” is the capacity to understand the effects of laws and the possible effects of rulings upholding or striking down totally or partially the statute. The lack of this competence troubles the system and affects judicial review as institution (Posner E. 2008:13-4). Judges that have judicial competence do not necessarily have legislative competence and therefore, in some cases constitutional revision of laws is not recommended to be performed by the same courts that solve disputes (Posner E. 2008:14).

⁸⁸ ‘Legal bias’ is “when the precedent in place favors one type of litigant, compared to the socially optimal rule” (Borchgrevink, 2008:1).

The hypothesis of legal theorists that in the vast majority of cases adjudication respects the law and is constrained by precedents and interpretative methods is attacked because one method of interpretation can lead to different possible answers (Volokh 2008:13,15). This analysis also looks into the influence of “judges’ political preferences”, and the reason for their methodological choices (Volokh 2008:16). A model was constructed to this effect: a perfect congruence is present when “an interpretative method’s most plausible point happens to coincide with the judge’s ideal point”, but if judges privilege their own agenda, the situation is “*perfect bias*”. When the emphasis is put on the “plausibility” or when the cost to deviate from the “method’s most plausible point” is very high, the situation is “*of perfect constraint*”, which is the image of “the ideal judge” (Volokh 2008:22-3). The choice of a method should normally be relevant for a case, but judges that seek to influence a larger amount of cases, may choose a method that is not the ideal for a concrete case, but that may have more incidence in a larger amount of cases (Volokh 2008:50). Provided that methodological choices of judges may be the result of ideology, interpretative methods may have a “precedential effect” when they are chosen repeatedly to increase the possibilities of being chosen in the future (Volokh 2008:45-6). The analysis concludes that a “good theory” may not be the best for all the cases and that in “a world of free methodological choice” it could be possible to put in evidence judicial “political biases”, although evaluating these biases is very difficult (Volokh 2008:56).

This assumption of legal theorists, that adjudication is based on the law and precedents, is also attacked by political scientists who consider that it is based on personal interest.⁸⁹ Many empirical studies are based mainly on the US Supreme Court case law, emphasizing the relevance of ideology when adjudicating.⁹⁰ Empirical evidence shows also that different judges may produce different decisions for a single case, due to the influence of ideology, but it cannot be demonstrated that this is the most important element to explain adjudication. In fact, language and precedent have a “fuzzy” scope (Cross 2006:28). When judges agree ideologically with a precedent, they can easily respect it. However, it is possible that they would take the same decision without necessarily be constrained by the precedent; hence the proof of the legal force of a precedent cannot be found in those decisions that judges are inclined to take (Cross 2006:30). Neither a “theoretical reason nor empirical evidence” was found to argue that the judiciary displays ex-ante strategic

⁸⁹ Projects to implement an “independent professional judiciary” in developing countries are criticized by some authors because judges are not supposed to be “capable of going beyond [their] self-interest in the name of the law or justice” (Entemann 1998:3).

⁹⁰The US should not be seen as representative in empirical research, because its Court has complete discretionary competences to select cases (Cross 2006:28).

behavior to overrule precedents. In contrast, the general acceptance of precedents is observed despite potential disagreements based on “their personal ideological preferences”. This study concludes that the binding character of the law and precedent exists, although judicial discretion in case of “linguistic indeterminacy” allows to take some distance, “but dramatic disregard of precedent appears to be rare” (Cross 2006:32). Others US based empirical studies have demonstrated significant relationships between (i) the ideology of individual judges and their decisions, and (ii) between judge rulings and the ideological orientation of the congressional majority that voted a law or the ideological affiliation of the actionist (Cross and Lindquist, 2006:14-1). There is also evidence that ideology explains an important part of precedent overturn (Cross and Lindquist, 2006:16). However for Sisk and Heise (2005), ideology may play a determining role in the decision making process of the judiciary, but this is only a part of the explanation of judicial behavior (Sisk and Heise 2005:794). They found that ideology plays a role in the selection and decision-making of federal judges but, at least at the level of lower federal courts, ideology explains only a minor part of the behavior of judges according to the available statistical evidence.⁹¹

Ideology is not the only motivation described in the literature. The relation between personal preferences and the respect for precedent is widely documented (Kuran 1990, 1995, quoted by Harnay and Marciano 2004:407). Judicial behavior may also be influenced by the purpose to maximize the judges own interest, avoiding to write opinions to drop caseloads⁹², to impede criticism and to increase leisure time. Precisely, the relation between leisure time, workload and respect for precedents may explain the preference for precedent over personal convictions (Harnay and Marciano 2004:408; Lindquist and Cross 2005:12).⁹³ Overruling precedents may be less efficient because judges may not be motivated enough to create rules that are time-consuming and that increase the risk of reversal of new innovative decisions (Schneider 2001; Harnay and Marciano 2004:408; Lindquist and Cross 2005:12). As a result, judicial behavior cannot exclusively be explained by personal judicial preferences, because other variables as “the conformity with the profession” or the asymmetrical information that judges have on the choices of colleagues also counts (Harnay and Marciano 2004:406, 419).

⁹¹ For a discussion on the methodology of empirical research in US legal scholarship, see Epstein and King (2002) and Cross, Heise and Sisk (2002).

⁹² The analysis of judicial discretion based on the degree to which decisions vary among judges has been criticized by Huang (2007). Individual judges might have felt fully constrained when taking decisions; biases attributable to differences in their judicial biographies do not necessarily demonstrate ‘discretion. Using data for 1998-2005, it is shown that when appeal courts are confronted with higher caseloads they appear to be more selective in ‘correcting errors’ of lower courts.

⁹³ Gey and Rossi (2004) discuss the measurability of performance of individual judges in a US context. Performance is thereby understood as productivity, influence and independence.

Other studies show that, despite the troubles to perform a 'rigorous quantitative study of precedent', ideology is constrained more in cases where 'relevant precedents' exist (Lindquist and Cross 2005:62-3). Ideology cannot well explain voting patterns of the court neither, because judges do not vote in the same way as legislators (Posner 2005b:49-50). 'Ideological biases' of the judiciary have been widely analyzed too. One finding is that judicial bias is more notorious in areas as civil rights and liberties and more discrete in tax and securities areas. Another conclusion is that judicial behavior in panel discussions depends on the political views of the members. Ideology is also an important factor in "reversal of lower courts" and the presentation of dissenting opinions (Choi and Gulati 2006:2).⁹⁴

A study focusing on the US Supreme Court concluded that personal ideology of justices influences rulings, and that precedent is very weak at this level, but not in lower courts (Brennen and Spaeth 1995:89-107, quoted by Lindquist and Cross 2005:22, 24). Several empirical studies in the US analyzed the issue. Knight and Epstein (1996:1019-20), analyzed whether precedent is the main instrument to understand judicial rulings and whether it may limit judicial discretion based on personal convictions. They concluded that precedent is respected by the Supreme Court, whereas its use for personal preferences is not proved (Knight and Epstein 1996:1033-4). The cohesion of the US Supreme Court precedents has also been empirically analyzed, seeking to identify variables that influence changes. 'Ideological decision-making', decisions rendered, unanimous decisions, and Chief Justice influence were taken as independent variables (Cross, Smith and Tomarchio 2006). Although ideology is widely considered as the main determinant of judicial rulings (Cross, Smith and Tomarchio 2006), the relevant role of the Chief Justice in adjudication was remarkable; the reasons (honest convictions or intentions to manipulate) to respect precedent were difficult to measure (Cross, Smith and Tomarchio 2006). The US Supreme Court is supposed to follow its own precedent, not because of its binding character but because it wants to do so, although this is not a warranty of correctness (Posner 2005b:43). Other empirical analyses of the US Supreme Court show that horizontal precedent is not as important as vertical precedent⁹⁵, because the latter has a relevant impact on lower courts. Moreover, legal doctrine is relevant to show the orientation for future cases although it may be

⁹⁴ One of the incentives to avoid dissenting opinions is because they weaken the binding force of the ruling as precedent, but dissenting opinions are also seen as a potential waste of work (Choi and Gulati 2007:13). Dissenting opinion shows a disagreement in the voting and the writing, whereas concurring opinion means that the voting process is agreed upon but the writing is difficult to conciliate (Choi and Gulati 2007:13).

⁹⁵ They also analyzed the behavior of justices with dissenting opinions who systematically defend their position regardless of the precedents (Spaeth and Segal 1999, quoted by Tiller and Cross 2006:525).

used strategically (Epstein and Knight 1998, quoted by Tiller and Cross 2006:525-526). Two empirical studies conclude that the US court seems to be influenced not only by the policy preferences of Congress and the President but also by their ideology, even more than by their particular reactions in each case. The Court is concerned about its institutional status quo and therefore, it seems to be more worried about the potential reaction of the Congress vis-à-vis its rulings than by the “responses in the statutory area”. As a result, it may adjust its decisions to the preferences of the Congress and the President (Segal et al. 2007:23-4; Bergara et al. 2003).⁹⁶

Judicial citation is not the same as precedent (Posner and Landes 1976:3-4). Citation is seen as highly representative in “adjudication [...] and legal research”. Citing is done to identify the source of information and to include “information by reference” but also to “provide an authoritative basis for a statement in the citing work” (Posner 2000:384-5). Citation analysis is a useful tool for quantitative analysis of phenomena such as “reputation, influence, prestige, celebrity, the diffusion of knowledge, the rise and decline of schools of thought, *stare decisis* [...], the quality of scholarly output, the quality of journals, and the productivity of scholars, judges, courts, and law schools” (Posner 2000:381-3).

The academic analysis of judicial opinions, independently from rulings, is increasingly considered as an efficient tool in empirical research, aiming to comprehend the judicial behavior (Posner 2000:402; Choi and Gulati 2005:18). One of the methods used is the analysis of citation trends seeking to demonstrate that, contrary to the position of Legal Realism, policy is not the only motivation of judges because they are constrained by precedents. This is an intermediate position between legal and social science models. The voting process in adjudication may reflect judicial policy preferences, “but biases in citations patterns” allow to conclude that precedent constrains their choices (Choi and Gulati 2007:3). Some empirical studies on judicial citations show that judges prefer to cite judges of the same party rather than judges from the

⁹⁶ Empirical studies on judicial behavior are mostly concerned with the case of the US (Bergara et al. 2003). For instance, Martin and Quinn (2002) analyze the measurement of preferred policy positions (i.e. ideal points) of individual justices on the US Supreme Court. Harvey and Friedman (2007) present evidence that the Rehnquist Court was constrained by the Congress, on the basis of a statute-centered analysis using all congressional laws enacted between 1987 and 2000. They showed a relationship between the electoral dynamics in the Congress and the Court behavior. Their methodology tried to tackle the selection bias problem of other case-centered analyses that often failed to find such a relationship. Miles and Sunstein (2006) investigate judicial review of regulatory legislation by the US Court and also reach the conclusion that it behaves politically. There is also evidence based on other countries like Argentina (Bill 2003) and Japan (Ramseyer and Rasmussen, 1994, 2001). Santori and Zucchini (2003) build a model (a strategic game) based on Gely and Spiller (1990) and Tsebelis’ veto player model (Tsebelis, 2002), and apply it to the case of the Italian Constitutional Court, using time series data covering the 1956-2001 period. They showed that the presence and activity of the Court lowers legislative policy change.

opposite party (Choi and Gulati 2006:5). They show also that citation bias tends to increase in the presence of a dissenting opinion, particularly from the opposite party; citation bias tends also to “cite disproportionately those judges that cite them the most”. The latter was mostly done by judges not belonging to the best universities; however, a clear tendency to cite judges from the same university was not identified (Choi and Gulati 2006:39). It has been proposed that one of the measures of independence may be the number of dissents and concurrences by judge; however, the reasons may be also the caprice or “unwillingness to compromise”. Another measure may be the number of times that a judge was opposed to other judges of the same political party (Choi and Gulati 2004, quoted by Choi and Gulati 2005:19).

Another empirical analysis of the courts of appeal in the US showed that “the greater the number and length of a court’s majority opinions, and the fewer the number of footnotes and of dissenting opinions, the greater will be the number of citations to that court by other courts.” The reasons are probably that footnotes tend to confuse the reader, and dissenting opinion affects the majority opinion when concrete censures are presented that would be better to “pass over silence” (Posner 1996:234-6, quoted by Posner 2000:400). Opinion production (lengths and quantity of dissenting and concurring votes) is diminishing in the US, maybe due to changes in the composition of courts (Posner 2005b:66-71). Moreover, judges do not appreciate writing opinions, because it is “time consuming” and they are also exposed to criticism. In the presence of caseloads, they tend to delegate this task, and therefore, opinions do not deserve the attention, that they receive from legal theorists (Posner 1993a, quoted by Entemann 1998:2).

A contrasting case is the French case where there are no dissenting or concurring votes, and the author of the opinion is not identified. It is a system with clear syllogistic legal interpretation that contrasts with the large legal reasoning. The “judicial development of the law” is reached through the “*rapport*” and the “*conclusion*” but not in the ruling itself (Popkin 2002:6). This is also the case of the European Court of Justice, which “does not even record the votes of its members” and dissenting opinions are neither published. As a result, the “influence of individual judges’ preferences on the output of the Court” is almost impossible (Shapiro 1992:124, quoted by Voigt 1999b:25).

According to Tiller and Cross (2006:528), the analysis of legal doctrine should consider the “substantive decision instruments (such as statutory interpretation, constitutional review or reasoning processes review), procedural decisions instruments (such as standing, ripeness or statute of limitations review) and legal

doctrines that attach to these decisions instruments as guidance on how to apply the instruments in the given case". In Civil Law countries those topics matter because the rulings often reflect "a biased subset of the relevant disputes" and the use of precedents is influenced by case selection of the parties and ideological preferences of judges (Fon and Parisi 2004:4).

Fischman and Law (2008) point to three methodological difficulties when measuring judicial ideology.⁹⁷ First, ideology is inherently (directly) unobservable so that indirect measurements of observable behavior is needed. Second, observable behavior is frequently open to multiple interpretations that are compatible with different explanations. Third, judicial ideology is a multi-dimensional concept.

Landau (2005) concludes that judicial behavior analysis should not only concentrate on "motives and values that simply do not exist", but it should concentrate also on what judges actually say. Posner considers that the US Supreme Court seems to act as a Constitutional Court because a large part of its work is constitutional law creation and it is therefore acting as a political court. The reason is that constitutional law refers to political issues, and is built on the vague and old age of the US Constitution. As a result, rulings cannot be classified as wrong or right from the perspective of the law, but it is possible to express agreement or disagreement with them; constitutional debates have a never ending character (Posner 2005b:39-41).

2.3.2 Courts and Public Opinion

The two-way relationship between courts and public opinion is another relevant issue. Public opinion has a particular importance for constitutional rulings, acting as a potential constraint to justices (Friedman 2004:1279-80). According to Friedman (2004:1282), judicial discretion linked to ideology is not the most important component of judicial behavior because some studies show a tendency of the constitutional ruling to be aligned with public opinion. It has even been argued that public opinion has a strong influence on politics and changes in judicial doctrine (Friedman 2004:1295, 1302; Law 2006:50). In the US, the relation between the independent judiciary and the protection of civil liberties has not been clear; but some analysts show that court's rulings on this issue are consistent with public opinion, which reaffirms the view

⁹⁷ For an overview of measurement methods (coding schemes, types of measures) and their relative performance, see Ditslaer (2005) and Fischman and Law (2008:15-38).

that civil liberties are better protected through democratic procedures than through an independent judiciary (Peretti 2003:86-7).

Some hypotheses can be formulated about the extent to which judges are influenced by public opinion, but researchers like Lehne and Reynolds (1978) ask to what extent courts contribute to the formation of public opinion. Using data from surveys of New Jersey citizens, they find that judicial activism does not directly and substantially affect public opinion.

2.3.3 Judicial activism

The analysis of judicial restraint and judicial activism is mostly done from the perspective of political theory (Posner 2004a:168). The concept of judicial activism appears with many connotations, because it has different definitions and interpretations. Judicial activism is first used to classify “those decisions whereby judicial precedents or statutory schemes are overturned” based on constitutional values, but it also “describes the expansive remedies imposed and monitored by [...] courts pursuant to evidentiary showings of constitutional injury”. The former is called “jurisprudential activism” and the latter “remedial activism” (Justice 2004:226). Remedial activism is justified because “if the law makes empty promises of justice and courts stand by -impotently watching constitutional violations persist without taking action to correct them- then we do not fulfill the promises of equal protection and due process”; but the quality of the relief of constitutional injuries also matters (Justice 2004:234).⁹⁸ A large scope for judicial discretion is justified because of the huge difficulties of adjudication (Frankfurter 2004:248,251). In Europe, judicial activism is seen as an instrument to reduce the inefficiency of the State and to compensate social inequities (Lenoble 1997:1).⁹⁹ Jurisprudential activism is also seen as a way in which judges try to adapt their personal perspectives to public policies and vice versa, which not necessarily implies that precedent is completely abandoned because they may use certain precedents to impose their views (Posner and Landes 1976:37). One method to identify judicial activism is the “comparison of the depreciation rates of precedents before and after the period of supposed activism”. However, it may be possible that precedent was activist and the reversal tries to correct the situation (Cross and Lindquist 2006:10-1, Posner and Landes 1976:66).

⁹⁸ The situation of the US in the fifties is quoted as an antecedent when the lack of state regulations increased the solidarity (Lenoble 1997:1).

⁹⁹ In Europe, the strengthening of the judiciary is justified by the crisis of the regulatory capacity of the state and the increasing relevance of fundamental rights. This phenomenon is explained as the change from a State of law to a State of rights (Lenoble 1997:2). But in other regions judicial activism is considered as the intention to use judicial decisions as an autonomous and creative power to push political and economic development (Kennedy D.1980:3-24, quoted by García V. 2001:479).

From a broad perspective, it is possible to distinguish between different classes of understandings (Cross and Lindquist, 2006): (i) judicial activism can have a positive connotation when referring to judges behaving according to Dworkinian principles; (ii) the concept can have a negative connotation when referring to an inappropriate exercise of judicial power grounded in the justice's ideology rather than in legitimate legal sources (Cross and Lindquist, 2006:3). The main connotation of judicial activism refers to judges acting as lawmakers, instead of applying the law (Cross and Lindquist, 2006:4).

The recognition of judicial activism is not necessarily easy. The concept is politically used to criticize judicial decisions, independently of the intrinsic characteristic of the ruling. In the US, judicial activism refers to activist behavior of a majority of judges in the Court, adhering to the ideology (liberal or conservative) of the majority political formation (and the President) of the moment, as a direct consequence of the way judges are nominated and appointed (Cross and Lindquist 2006:4-6). Normally, the analysis of judicial activism is focused on rulings striking down laws but "inappropriate judicial activism may take a variety of other forms". When judges "legislate" in the presence of a declaratory of unconstitutionality it is a form of "judicial legislation", which may be modified again by legislators and which does not have the same enforcement as law. Giving unnecessarily broad opinion not directly related with the decisions is another form of judicial activism because judges may usurp competences of other branches of power (e.g. opinions referring to public expenditure) (Cross and Lindquist 2006:2).

Judicial activism is also understood as a situation in which the judiciary fails to act as a real judge. And some parameters are provided to define adequate judiciary behavior, as follows: first it must use "accepted interpretative methodology", i.e. the hermeneutic must be reasonable, avoiding distortions of the text seeking personal goals. Second, it must respect precedents. Third, rulings should respect the external principles of the law, avoiding internal opinions of the judiciary. Empirical research following this perspective highlighted a relation between ideology and judicial voting, but it is not the most determining factor in adjudication (Segal and Spaeth 1993, quoted by Cross and Lindquist 2006:3). But adjudication must also be analyzed independently from the judges' personal opinions (Cross and Lindquist, 2006:12-3).

The evaluation of judicial activism is difficult because there is no concrete and practical definition of judicial activism. It is necessary to design a parameter to evaluate the position of the ruling vis-à-vis the "correct

decision". One proposal is the following: The first "qualifier" is ideology; the second is the "strength of case"¹⁰⁰; and the third, the size of the coalition annulling the law. If the ruling is taken by unanimity, activism is less likely. However, those criteria are not sufficient to classify a court as activist¹⁰¹ (Cross and Lindquist, 2006:20-2).

In empirical analysis, judicial activism usually refers to judges striking down statutes but it can also refer to judges overturning precedent. The conventional standard is therefore the number of declarations of unconstitutionality of actions of the government and Congress. However, this measure is not necessarily accurate. As Cross and Lindquist point out (2006:7-8), this measure includes cases where the Court operates completely within its mandate and judicial functions. They list a number of alternative definitions, including: (i) case decisions based on partisan political preferences, (ii) departure from judicial precedent, (iii) giving unnecessarily broad opinions, (iv) declarations of unconstitutionality in cases of uncertainty, and (v) departure from texts. In addition, it should be acknowledged that judicial activism is not only about overturning laws, but also about interpretation and remedial actions.

In order to operationalize judicial activism, the number of times justices invalidate a law can be taken as a first measure. This is a valid although not a perfect dependent variable and one can then try to relate this measure to the ideological position of the judges. The assessment of this position can be based on their own voting behavior in the past or on independent information. Cross and Lindquist (2006:20-1) recommend to focus on "systematic tendencies of judicial activism", rather than on judicial activism in individual decisions. In the latter case, the analysis is too dependent on subjective benchmarking on the side of the researcher. They further add that it is relevant to relate the decisions of individual judges to decisions of the Court and to analyze whether these are unanimous or following coalition divides (Cross and Lindquist, 2006:22). Unanimous decisions are supposed to point to less activist behavior. Choudry and Hunter (2003), who studied the Canadian case, also recognized the difficulty of distinguishing between 'legitimate' and 'undue' interference of the Supreme Court with legislative decisions. They propose a pragmatic solution for the purpose of their empirical research, assuming that the level of legitimate

¹⁰⁰ Indicators of the latter include the use of the concept of the Solicitor General because it is considered free of a partisan agenda. The US Solicitor General is appointed to represent the Government before the Supreme Court, when the government is party to a case. http://en.wikipedia.org/wiki/Solicitor_General_of_the_United_States.

¹⁰¹ The Segal-Spaeth database coding Supreme Court decisions has been broadly used in legal and political science (Cross and Lindquist, 2006:20-2).

(appropriate) interference of the Court is constant over time. They discuss also the issue of possible selection bias by the Supreme Court, but do not provide a way to tackle this issue in empirical research¹⁰².

Judicial restraint is opposed to judicial activism and seeks to protect “legal predictability, uniformity and judicial economy” which represent the “values of liberty and democracy” (Wallace 2004:146). Judicial restraint accepts and respects large discretionary competences of the legislative (Wallace 2004:148). Social policy, for example, is a legislative competence and the judiciary should “look for ways to up-hold legislation rather than to strike it down” (Wallace 2004:149). According to judicial restraint, “it is better for the majority to make a mistaken policy decision, within broad limits, than for a judge to make the correct one”, and hence, procedure is more important than decisions (Wallace 2004:149). Judicial restraint promotes efficiency because the cost of courts is justified in “settling disputes” but not in “re-engineering social structures and reorganize social priorities” (Wallace 2004:151). Judicial restraint is also perceived as a way to respect other branches and to warrant “inter-branch equality”. JI is affected when courts decide social policies, because acting as politicians, judges disturb the separation of powers, usurp their competences and as a result, a sort of political control should be designed for judges (Wallace 2004:151-2).

2.3.4 Judicial independence (JI): attitudinal *versus* strategic approaches

Bergara et al. (2003) distinguish between two approaches to JI: first, the ‘attitudinal approach’ (see 2.3.1.1.)¹⁰³ sustains that “justices make their decisions based exclusively on their individual ideological preferences”. Second, the ‘strategic school’ believes that “justices, like all other economic actors, are forward-looking players with well-defined and stable policy preferences [...] when formulating their actions, they consider the potential reactions of their policy competitors”.¹⁰⁴

Jl is considered as one of the main policies of international institutions like the World Bank, promoted worldwide through judicial reforms, and seeking to improve the rule of law, growth and development (Pozas and Rios 2006:2). Adjudication outcomes are directly related with the independence and impartiality of judges. As a result, the theoretical and empirical literature on judicial behavior agrees on accepting that

¹⁰² Choudry and Hunter (2003) analyze judicial activism in Canada using a dataset of Supreme Court decisions from 1982 to 2002. They do not find evidence of increasing judicial activism in that period, contrary to widely held views.

¹⁰³ It is represented by Pritchett (1941), Schubert (1965), Segal and Cover (1989) and others.

¹⁰⁴ The strategic school is represented by Gely and Spiller (1990) and others. For a theoretical model of the determinants of independent judicial review, and the relevance of the country context, see also Tridimas (2005). Padovano et al. (2003) developed a political economy model of the separation of powers.

individual attributes of justices may determine the outcome of the case (Choi and Gulati 2005:1); particularly, justices should be well qualified to adjudicate (Summers 2000:1813-5). The design of safeguards to avoid the temptation to prejudge, due to external influences or economic conflicts in a particular process is therefore seen as necessary. JI and impartiality¹⁰⁵ are seen as the main institutional characteristics of the judiciary vis-à-vis the rule of law, and not vis-à-vis judges. The notion of independence is the negation of autonomy because the judges have to decide also independently from their own beliefs. It neither signifies sovereignty (meaning that they have the last word), because they would be “out of institutional control”. JI seeks to guarantee the right to citizens to be judged according to the law and not under the influence of power relations or particular interests. That is why the limits to the right of association and a strict incompatibilities regime are so important in the regulation of the judicial career (Aguiló 1997:74-9). Impartiality is protected through the use of the abstention and the challenge or motion. When adjudication is motivated by reasons other than the law and judicial reasoning is supported in arguments rather than proofs, the rule of law is disturbed, because the explanation of rulings and justification must coincide (Aguiló 1997:74-9).

An additional condition to improve the rule of law is judicial accountability, presented as an incentive to make judges impartial. The term was defined as “the costs that a judge expects to incur in case her behavior and/or her decisions deviate too much from a generally recognized standard, in this case referring to the letter of the Law” (Voigt 2005:4-5).¹⁰⁶ But one of the criticisms to accountability is that other branches may have as strategy to show courts as part of ordinary politics that should be accountable as such, i.e. they act as politicians but reject political control. JI is based on generalized support independently of their rulings (“diffuse support”), contrary to “specific support” which depends on the rulings (Burbank 2006:1). Therefore, politicians promise “to hold courts accountable”, by appointing reliable judges, monitored through ‘oversight’, and judged through impeachment. This proposition may increase the influence of interest groups on the selection of judges. The analysis concludes that a good institutional relationship among public powers is obtained by keeping the judiciary far from the “attitudes and techniques of contemporary politics” but not to elude politics (Burbank 2006:2). Therefore, judicial accountability and JI

¹⁰⁵ Independence refers to the control of the motivations of the judges vis-à-vis (external) influences from the social system on ruling. Impartiality refers to the control of the motivations of the judges vis-à-vis (external) influences in the process, i.e. independence from the procedural parties and from the object of the process (Aguiló 1997:74).

¹⁰⁶ For further definitions of accountability, see Blagescu and Lloyd (2006).

are complementary; judicial accountability has to avoid unchecked decisional independence and other judicial conducts hostile to competences of the courts (Burbank 2006:4).

Other authors argue that the judicialization of politics facilitates judicial activism and puts JI in danger, and therefore more control and accountability is required to reach more transparency and “new forms of interaction between politics and the judiciary” without affecting its role (Voermans 2007:149). The relation between JI and accountability is related to the links between judicial discretion and political ideology, particularly on the budget of the judiciary and the quality of the public service (Contini and Mohr 2007:27). The quality control of adjudication has evolved from material control to process control, linked to the management of the judiciary (Frydman 2007:3).¹⁰⁷ Accountability is defined here as “a complex of means which reinforce the responsibility of public actors” (Contini and Mohr 2007:27). Judicial procedure is a form of quality control from the legal point of view, but there are attempts to replace it by a management approach, seeking to implement accountability from a budgetary and productivity perspective (Contini and Mohr 2007:33). Those tools are criticized as limiting JI, although not affecting impartiality (Contini and Mohr 2007:39). The perspective of judges who seek to protect their independence is not the same as the perspective of managers who consider the judiciary as a group of decision-makers who need to be evaluated (Contini and Mohr 2007:42).

The concepts of hard and soft accountability are therefore formulated as follows: the former refers to traditional control of the judiciary via “recruitment, appointment, promotion, [...], disciplinary action, [...]”, whereas the latter refers to the instruments to obtain “procedural transparency, representation and sensitivity” vis-à-vis the social interests and needs, which would increase the social accountability of the judiciary (Voermans 2007:150). Soft accountability is viewed as carrying the risk of judicial politicization. But the approaches that seek to privilege inter-branch dialogue consider that judicial opinions are supposed to strike a balance between “judicial authority and democratic accountability” (Popkin 2002:15), i.e. dynamic judicial interpretation promotes a sort of judicial activism with a high degree of “accountability, representation and responsiveness” (Schacter 2002:4-6).¹⁰⁸ The lack of elections in appointing the judiciary

¹⁰⁷ In Europe, the “new public management” approach to control the judiciary has gained relevance, as in North America and in public administrations in general (Frydman 2007:10). The Judicature Counsels are charged with the quality control of the judiciary, replacing legality control by management control (i.e. quality control of the public service) (Frydman 2007:12).

¹⁰⁸ Written judicial opinions warrant judicial accountability because “[the judges] cannot freely indulge their personal policy preferences in interpretative rulings”. More representative courts are supported in the presence of a biased congress, and

may be an obstacle to make it accountable, but this argument was contested for reasons of timing. In the legislative, for example, bad laws are not necessarily taken into account to sanction congressmen through elections; therefore, elections are not perfect neither in the legislative process (Schacter 2002:13-6).

Other studies argue that judges are rather constrained by the Congress because of the use of impeachment and the control of judicial wages, staff and budgets. The impeachment, as a form of control of JI, is criticized because it may not be based on “judge’s judicial acts” (Rehnquist 2004:4-6). The executive may also limit the judiciary through the implementation of rulings, and therefore, rather than a judicialization of politics, the politicization of the judiciary is observed (Cross 2000:18; Tamanaha 2007:19). The judicialization of politics is criticized because it promotes the politicization of the judiciary due to the growing interest of political actors to capture it (Ferejohn, Rosenbluth and Shipan 2004:1). As a solution, the judiciary is asked to “develop the habit of self-restraint” and the executive and legislative should develop “the habit of obeying judicial judgments”. Self restraint and respect of precedents warrant JI and the respect for the rule of law. This approach did not find evidence that Congress interferes with administrative obstacles in response to particular rulings (Edwards 2001:2-3). The risks for JI rather reflect a conflict among public powers about the prioritization of values and public policies. The institutional approach of inter-branch collaboration is defended as a way to warrant that constitutional changes and public policies change once a consensus is reached. As a result, JI may be seen as a problematic concept because public policies are designed on the basis of the interaction of public powers (Peretti 2003:102-3). The link between JI and judicial ideology is therefore relevant in the choices of judges, and the appointment of judges becomes crucial (Peretti 2003:89-90). However in the US, the hypothesis that the ideology of judges is crucial to apprehend adjudication in the (Circuit) Courts (i.e. the attitudinal model), as well as the quantitative approaches to judicial decision-making following the strategic model, are criticized by Judge Edwards (2003). The role of collegiality makes that “judges have a common interest, as members of the judiciary, in getting the law right”; hence, they seek to “listen, persuade, and be persuaded, all in an atmosphere of civility and respect”. Collegiality therefore favors principled agreement, because all the visions are taken into account. It is supposed to neutralize “the role of partisan politics and personal ideology” because judges with concurrent opinions and philosophies may present their ideas and influence the decision. However, not all courts operate in a collegial way and ideologically divided courts also exist

responsiveness is linked with policies including social preferences, providing that, as Eskridge argues, sometimes courts are closer than other branches (Schacter 2002:4-6).

(Edwards, 2003:1645).¹⁰⁹ Staudt et al. (2008) consider that ideologically homogeneous majorities in courts are more likely to produce consequential (activist) constitutional case law and majorities of minimal size are more likely to produce consequential case law than unanimous courts.¹¹⁰

Nevertheless, JI continues to be considered as a value that warrants the rule of law, economic development and fundamental rights, although these hypotheses have not been widely tested (Peretti 2003:84). The actual relevance of JI is contested because of the difficulty of its measurement and conceptualization (Pozas and Rios 2006:2). An analysis of the different methods proposed for the calculation of JI shows the extreme difficulty to find an ideal method of quantification.¹¹¹ These methods include the following: i) the analysis of legal consistency, ii) the axiological consistency, iii) the legality of the process (inference of the positive dimension), iv) the statistical comparison between results and preferences (inference of judicial dependence), v) the calculation of formal institutions and the informal practices (inference of JI). It concluded that the best option is to analyze particular cases rather than to formulate generalized conclusions, provided that the huge amount of judicial dependencies and heterogeneous rulings make the task implausible (Linares 2003).

Some empirical studies showed that formal JI, i.e. regulated by laws, does not coincide with *de facto* JI, which depends on other variables (Feld and Voigt 2003 quoted by Hayo and Voigt 2003:2). The analysis concluded that the most important variables that explain *de facto* JI are formal JI, the degree of democracy and the freedom of press, other relevant variables but less representative were the degree of citizen confidence in the legal system and religious beliefs (being the catholic belief the most influential on *de facto* JI); however, it concludes also that each variable may have a different impact depending of the country (Hayo and Voigt 2003:21-4).¹¹² Feld and Voigt (2004) empirically tested of the relation between JI and

¹⁰⁹ The literature on collective judicial decisions analyses also the process of collective decision-making in courts. Independently of the characteristics of the individual judges and their behavior, this literature shows how (collective) decisions of courts (also) crucially depend on the organizational rules (including voting rules) of the courts. It shows also the possibility of inconsistent collective decisions even when individual judgments are all consistent. This is illustrated by the Condorcet and doctrinal paradoxes (Kornhauser and Sager (1986) and Kornhauser and Sager (1993) quoted by List (2002)) which refer to the paradoxical collective outcome of proposition-wise majority voting on interconnected propositions (see also List and Pettit 2005).

¹¹⁰ The study was based on the US Supreme Court database for the period 1953-2005. See also: Epstein et al. (2007)

¹¹¹ Some measures are defended, like the frequency of overturned governmental actions by Courts, and the reactions of Courts vis-à-vis government nationalizations (Ferejohn, Rosenbluth and Shipan 2004:17-8).

¹¹² The case of Colombia is curious because with observations from 46 countries from the five continents, it obtained the first place with respect to *de jure* JI, followed by Brazil and The Philippines. The lowest scores were for Bulgaria, China, Lithuania and Switzerland. In the analysis of the *de facto* JI, the highest scores were for Switzerland, Japan, Austria and Italy, and the lowest were for Bulgaria, Russia, Peru and the Czech Republic. Countries like the US, Korea, Chile, Ukraine and Colombia occupied

economic growth. They distinguished between *de jure* and *de facto* judicial independence and construct composite indices of both (Feld and Voigt 2004:8-10). On the basis of cross-section regression analysis using data of about 80 countries, they concluded that *de facto* judicial independence has a strong and statistically significant positive impact on economic growth, while *de jure* judicial independence does not have a similar impact.

In Latin America, the generalized conclusion of various empirical studies is that the distance between *de jure* and *de facto* JI is big (Pozas and Rios 2006: 2-3). As in the US, some studies linked JI with the “distribution of the political power in the elected branches of the government” (Pozas and Rios 2006: 32). The literature on the optimal levels of JI (discretion) vis-à-vis other branches is also called ‘positive political theory’ (Weingast 1996). A by-product of this approach is the normative literature on ‘optimal constitutional design’. Feld and Voigt (2004:8-10), for example, list a number of provisions that could increase JI: (i) a more stable set of constitutional provisions within which they operate; (ii) appointment procedures that are more independent from other branches; (iii) larger judicial tenure; (iv) salaries less depending on other branches decisions; (v) more accessible courts, with more initiating powers; (vi) more general rules with respect to allocation of cases to individual judges; (vii) more competences for constitutional (judicial) review; and (viii) more transparency through the publication of decisions (including dissenting opinions).

Public Choice suggests also some mechanisms to guarantee JI.¹¹³ The ideal selection of judges is done by the legislative, with the “optimal voting rule” (unanimity) to ensure impartiality. However, self-election by the judiciary has also advantages because it is an incentive to appoint the best (Mueller 1999:124-5). Some incentives and institutional designs taken from the US system were proposed to obtain that justices act on the citizens’ behalf, avoiding their “avaricious appetites”: (i) nomination of justices by the President, but approved by Senate; (ii) life tenure¹¹⁴, subject to good behavior, and (iii) judge’s salaries that cannot be reduced by any branch. The first does not impede the politicization of the nominations but the other incentives allow justices to act far from any political obligation supposed to be linked with getting the post. However, those rules do not guarantee the impartiality of judges. The impeachment process allows the removal of corrupt or less able judges but this does not guarantee that they take the best decision for

intermediate positions (Hayo and Voigt 2003:25). This reinforces that it is very difficult to draw general conclusions and establish relations between *de facto* JI and development level, kind of legal system, political regime etc.

¹¹³ This was a recommendation for the appointment of justices in Latin America, whose judiciary was considered weak and not independent, because the executive branch has a high influence in the judge’s appointment.

¹¹⁴ Life tenure is also a measure to protect justices from bribery and undue pressures (Landes and Posner 1975:15).

citizens (Mueller 1999:125-6). Other analyses question the thesis that constitutional protection of JI through life tenure and budgets guarantees its realization, and even more, in some countries this protection is higher than necessary and does not reach the goal¹¹⁵ (Peretti 2003:97-8).

2.3.5 Inter-branch analysis of judicial behavior

Another issue is the limitation of judicial discretion by legislative overruling, which may be influenced by the behavior of political parties in the country.¹¹⁶ If parties are undisciplined, more negotiations are needed to enact laws and then, courts would have more room to interpret statutes (Cooter and Ginsburg, 2003:4).¹¹⁷ However, in general, judges have the incentive not to diverge too much from the choices of the voters (Voigt 1999a:535). Cooter and Ginsburg (2003:16-8) tried to demonstrate that judicial discretion is the lowest in countries with a low number of vetoes¹¹⁸ and high average coalition duration in the government, whereas judicial discretion is the highest in countries with either a large number of vetoes or a low average cabinet duration. The empirical first realized was about judicial daring:¹¹⁹ the type of legal system did not reveal to be relevant because the results on either extreme referred both to common law systems (the US and UK) whereas the continental systems were distributed along the range without a specific pattern of conduct. Reforms concerning vetoes had more impact on judicial daring than those concerning coalition duration. JI from the political process (e.g. through the budget, promotions, etc.) was another relevant variable because politicians may have more influence on adjudication when they control those factors, although this variable was not always included in the studies (Cooter and Ginsburg 2003).

Vanberg (2001) also stresses the impact of political institutions on the functioning of constitutional courts. He shows how the interaction between courts and legislative majorities crucially depends on the public support that constitutional courts enjoy, on the one hand, and 'political transparency' (i.e. the ease with which citizens can monitor legislative reactions to judicial rulings), on the other. Higher levels of public

¹¹⁵ Counter-examples include the UK, where the judiciary is strongly linked to the Parliament but notwithstanding it is seen as an example of judicial independence, whereas in Argentina legal rules protect the independence of the judiciary but in practice the executive may strongly influence it (Peretti 2003:97-8).

¹¹⁶ In the US, the composition of the political parties and the political fragmentation has been analyzed as a factor influencing judicial independence (Ferejohn, Rosenbluth and Shipan 2004:6).

¹¹⁷ Implicit constitutional change increases with an independent judiciary because it analyzes the constitutionality of other branches' acts. The scope of adjudication depends on several factors analyzed by Cooter and Ginsburg (1996), as the complexity of the reform procedure in the Congress, the characteristics of the political parties, the legal system and the possibility to organize referenda on the appointment of justices.

¹¹⁸ Legislative vetoes were defined as the potential obstruction of the enactment of legislation (Cooter and Ginsburg 2003:8).

¹¹⁹ Daring was defined as "willingness to make new law through interpretation or willingness to adopt interpretations contrary to government preferences" (Cooter and Ginsburg 2003: 24-5).

support and transparency lead to stronger courts. He presents a game-theoretic model to show the incidence of the political variables, assuming the strategic nature of the interaction between courts and the legislative majority. He found that courts, when drafting their rulings, take into account different scenarios with respect to the implementation of their rulings by the legislative majority (or the administration), including different ways to evade a decision. Likewise, the legislative majority, when drafting a new law, takes into account different scenarios with respect to constitutional revision and tries to anticipate the court's behavior. In the real world, particular combinations of public support, political transparency and congressional preferences will determine judicial behavior and the legislative majority as the result of this 'constitutional review game'. The author illustrates the validity of his model using the case of the German Constitutional Court (Vanberg, 2001:355-85).

Baird and Hurwitz (2002) show that influence among branches of power occurs in different directions. Not only are the executive and the legislative influencing the judiciary, but also the other way round. Using time series data on US Supreme Court decisions, on the one hand, and policy-making decisions of the President and the Congress, on the other, they statistically show that the Supreme Court has indeed the power to influence the policy preferences and outcomes in the other institutions. Finally, another study designed the "ideal" judicial characteristics to guarantee good inter-branch relations as follows: (i) receptivity and open-mindedness towards "requests for information from Congress"; (ii) proactiveness in presenting opinions on bills (requested or not) and promotion of bills in areas related to the judiciary, avoiding interest-group behavior; (iii) honest definition of "areas of legitimate concern to the judiciary"; (iv) no intervention in the design or reform of "existing substantive rights" (Burbank 2006:9-11,13).

2.4 Comparative legal theory and constitutional case law

Judicial discretion is also a criterion used to distinguish between legal systems. It is widely accepted that the common law system has a large degree of judicial discretion whereas civil law countries privilege "legislative rulemaking".¹²⁰ Some authors support the idea that "cognitive failures" are the factor that determines the degree of judicial rulemaking most (Arruñada and Andonova 2008:668). Unlike the US, European legal system tend to limit judicial discretion and to protect Legal Formalism. However, economic integration and globalization have favored the expansion of judicial discretion and increased the relevance of other normative legal schools such as Legal Pragmatism (Posner 2004d:157-9). In this section, some

¹²⁰ On the evolution of the common law and civil judicial systems, see Arruñada and Andonova (2008).

particularities of the worldwide adoption of the theories explained in the previous sections are presented. Particular emphasis is laid on their reception in Latin America and, more particularly, in Colombia. A brief reference to the institutional constraints of less developed countries is also made, because they have an incidence on the way legal theories are applied by the judiciary. Or, from another perspective, the phenomenon of the globalization of the law has put in evidence that some countries are places of “production” of legal thought and other are places of “reception” (López 2004:15-21; Kennedy D.2006:23). The globalization of legal thought is not new. According to Kennedy D. (2006:23), three waves can be identified: the German hegemony in the second half of the XIX century, the French hegemony in the first part of the XX century, and the US hegemony after that. In this section the focus will be on the latter.

2.4.1 Citation of foreign doctrine and law

A relevant aspect of the adoption of international trends in judicial adjudication also depends on the instrumental capacity of courts. One issue relates to the citation of foreign doctrine and law. Mainly two approaches try to explain the phenomenon. First, ‘normative universalism’, an interdisciplinary theoretical approach between comparative constitutional law and international human rights, promotes the use of general principles to protect human rights worldwide (Tushnet 2008b:5). Second, ‘contextualism’ follows comparative constitutional law privileging the particularities of each country (Tushnet 2008b:10). Tushnet (2008b:15) analyzes the potential changes that a “borrowed institution” may suffer once “it crosses the border”, as well as the possibility that imported institutions have national roots in spite of their appearance in an international bibliography. Judicial globalization is characterized by a frequent application of balancing tests by courts and by the mutual citation in human rights matters, named the “new *ius gentium* of human rights” (Grey 2003:7). The relevance of the judiciary is also seen as an important aspect of a new form of globalization of the law (called ‘the third globalization’) where institutional innovation (cf. structural adjustment, economic integration organizations etc.) (Kennedy 2006:64) and human rights are the center of this globalization. This movement is seen as the conclusion of a long process of increasing pertinence of rights, “to become the universal linguistic unit”. Sometimes they take the form of rules and sometimes they are policies, but their relevance is never doubted, even if they are not part of the constitution (Kennedy 2006:65-6). Law and “conflicting considerations (balancing, proportionality)” are present in judicial affairs and the number of adjudications depends on the number of “law-making authorities” (Kennedy 2006:67).

In the US, the question whether foreign and international case law, law or doctrine should be considered by the judiciary has been frequently debated¹²¹. Justices Breyer and O'Connor justify the potential use of those materials because globalization and the diffusion of the protection of human rights have an incidence on US constitutional cases (Gray 2007:5-6). Justice Scalia opposes this possibility because it is not in line with the meaning of the US constitution (Gray 2007:11-5). Other arguments against the citation of foreign legal materials, include the following: (i) It is a way to promote judicial activism because judges have an unlimited choice, easing the "risk of selection bias" and personal preferences and menacing the rule of law (Kochan 2006:509,542-4; Posner 2005b:86-8); (ii) it facilitates the participation of pressure groups in adjudication, seeking the inclusion of principles not contemplated in the constitution that benefit their own interests; (iii) legal certainty is affected because citizens do not know the applicable law and constitutional competences concerning the lawmaking powers are ignored (Kochan 2006:509,549-51); (iv) the complexity of the social, political and cultural contexts complicates the understanding of foreign law and doctrine; (v) Foreign citation is "opportunistic" because it is a way to avoid the presentation of personal opinions, disguising them as foreign citations. It mystifies "the adjudicative process and disguises the political decisions that are the core of the Supreme Court's constitutional output" (Posner 2005b:86-8). In sum, world constitutionalism is not considered as having a strong influence on US constitutionalism (Ackerman 1997:772).

In another context, foreign citation is also seen as arbitrary although a common practice of new constitutional regimes. "Bottom up globalization" is a phenomenon which explains how the global circulation of interpretative paradigms among judicial systems creates new relations of interdependence, different from the traditional mechanisms of competences of the executive and the legislative (Lollini 2007:72-3). In Latin America, contrary to the US, foreign citation by constitutional courts is the general rule (Oquendo 2008, quoted by Schor 2008a:281). The cases of the Colombian and South African Constitutional Courts are seen as examples of great receptivity of legal concepts developed in foreign countries (Herdegen 2006a:71-6.).

Defenders of this practice considered it as relevant in the case of international treaties. A dynamic interpretation based on "background drafting and negotiations materials" should be preferred over the textualism that would ignore the nuances of the different legal systems and would impede the creation of a

¹²¹ For a brief presentation of the US Supreme Court in the XX century, see (Friedman 2004).

transnational jurisprudence (Eskridge 2002:38-9). Another argument in favor of foreign citation is based on the natural law which implies universal principles “that inform –and constrain- positive law”. They are supposed to be “visible in foreign legal systems” and their citation would provide “evidence of universality”. But the critics argue that there is no consensus on the contents of natural law and maybe the solution is to find a “global judicial consensus” (Posner 2005b:85).

2.4.2 The globalization of the balancing method

Balancing is supposed to be “globalized” when national and international courts adjudicate in constitutional and human rights matters (Bomhoff 2008:3). It has been as a “viral” phenomenon because it expands rapidly from one jurisdiction to another and then worldwide (Stone Sweet and Mathews 2008:113,161). As said before, this method is one of the characteristics of the globalization of legal thought (Kennedy 2006:22; Bomhoff 2008:4); its expansion reflects a global tendency with high impact on constitutional adjudication (Stack 2004; Gargarella 1997; Iglesias 2000; Marmor 2004; Ruiz 2000; Cea 2005). The crisis of Legal Formalism is attributed partly to its incompatibility with globalization (García A. 1997:67).

Although the similarities among courts when they adjudicate on human rights issues are widely cited, the differences have not had the same attention (Stone Sweet and Mathews 2008:74-5). Comparative law has been designing different methods to analyze the topic, taking into account that “the language of balancing – and proportionality – has become a new *lingua franca* of courts and constitutional scholars around the world” (Bomhoff 2008:8-17).¹²² But the conclusion is that comparative “judicial balancing” is difficult due to the “ambiguities and dualities” in the terms that impede to find “common terms of reference” and to the great differences in context and institutions among countries (Bomhoff 2008:31-3). The globalized adoption of balancing is also criticized because it was constructed on a particular European rationalism. Hence, it should not be presented as a universal theory, because it ignores the circumstances of particular cases that determine moral judgments, and therefore, it would have an ethnocentric purpose (Vigo 2003:220-1).

Balancing differs strongly among courts. In the US, for example, balancing tests exclude the “principle of proportionality”, whereas in Germany balancing is highly related with values that are supposed to have “a strong universal dimension” (Bomhoff 2008:5-6). The proportionality test, which is at the core of the

¹²² For a comparative analysis of constitutional adjudication and balancing, see Bomhoff (2008) and Tushnet (2008b).

balancing method, is based on the German doctrine and then passed to Europe¹²³, the Commonwealth systems and Latin America. At the international level, the European Union, the European Convention of Human Rights and the World Trade Organization¹²⁴ frequently choose it as method of interpretation (Stone Sweet and Mathews 2008:74-5). In Latin America, curiously, the “reasonability principle” was used to control discretionary acts of governments. The principle was first recognized in the Latin American Congress of Constitutional Law in 1975 where the case of its adoption by the Constitutional Tribunal of Argentina was presented. Another curiosity is that its source was the “*recourse de deviation de pouvoir*” of the case law of the French Council of State (Fix 2001:293).

Human rights NGOs promote the globalization of constitutional law as well as “transnational treaty bodies whose decisions have domestic constitutional implications”, as the European Court of Human Rights (Tushnet 2008c:5-6; see also De Sousa 1993). The generalized use of balancing as procedure that “combine(s) the universal - the interest to be balanced- with the local, the context within balance” is supported although the generalized application is complex because “apparently small differences in detail can have consequences, both doctrinally and practically” (Tushnet 2008c:17).¹²⁵ The adoption of foreign constitutional doctrine is more important in fundamental rights issues than in issues of structures, because the latter is highly related with domestic politics (Tushnet 2008c:18). For this reason, the globalization of constitutional law is based on the expansion of human rights (Tushnet 2008c:20).

2.4.3 The relevance of institutions in the adoption of legal models

The analysis of the judiciary and the adjudication process in developing countries is directly related to the institutional capacities. One problem is the realization of the rule of law, understood as the existence of limitations on the exercise of the public powers and creation of a public order in the relations among citizens (Tamanaha 2007:3-6). The rule of law is supposed to produce certain, and predictable relations

¹²³ The French case is exceptional because traditional methods of interpretation (the exegetic, the social purpose and the free scientific method) and the classification of “grammatical, logical, historical and teleological interpretations” are dominant (Carbonnier 1979:177; David 1960:140-6, quoted by Germain 2003:197-201). The method of Gény did not have a wide reception in France (Germain 2003:201). Rulings are very short and “do not explain the policy decisions made and the reasoning that led the judge(s) to arrive at a certain result”. Policy reasons are in the *recommendations* (conclusions) presented by the party representing the state (Germain 2003:202-3).

¹²⁴ Sweet and Mathews (2008:139-60) presented the balancing method in these international organizations.

¹²⁵ Conflicting situations are also usual. The processes of economic integration for example, also involve constitutional protection because the countries compete “for investment and human capital” (Tushnet 2008c:7-8). The worldwide recognition of ESC rights may be seen as a barrier for foreign investments, but simultaneously, international institutions support ESC rights enforcement because they are supposed to increase the productivity of countries (Tushnet 2008c:15-6; Mohr 2007:46).

among the citizens and with the state, and it is supposed to limit discretionary competences of public authorities and to promote economic development (Tamanaha 2007:8-11). An independent judiciary is considered as crucial for the achievement of the rule of law as well as a “well developed legal profession” (Tamanaha 2007:14-5). But in developing countries, the rule of law is obstructed because the judiciary lacks political support and is marginalized from politics¹²⁶. The judiciary lacks also effective mechanisms to enforce rulings and hence, political and economic actors cannot reach their goals (Schor 2006b:1).

The lack of means in developing countries is one of the causes that impede a good legal system but without it, they cannot get the means to have such a system. Some concrete measures are recommended to reduce incompetence and corruption. First, it is cheaper to have good rules than to have good institutions and therefore, the former must be privileged. Second, judicial discretion should also be limited, privileging rules over standards or general principles “which require subtle reasoning to arrive at a decision”, because of the lack of academic background of the civil service and the judiciary. The aim is to get better performance in adjudication as well as better control. In rich countries the inverse situation is desirable (Posner 2004c:77-8; Cooter and Schäfer 2004:31-2).

The EAL approach supports such ideas, assuming that “public policies for economic development” are affected by “nepotism, corruption, and political favoritism” (Cooter and Schäfer 2004:7). Failures in the realization of the rule of law in poor countries are due to corruption, the lack of resources of the judiciary, and the huge influence of interest groups on the government (Cooter and Schäfer 2004:28). Governments, instead of financing “growth by public policy”¹²⁷ should design “a legal framework in which private investors finance growth”, and property and contract law are crucial to this end (Cooter and Schäfer 2004:10).¹²⁸ This

¹²⁶ This phenomenon is linked with the analysis of legal transplant and the adaptation of legal systems to foreign systems. Although this subject is not developed in this thesis, the taxonomy of legal systems proposed by Mattei (1997) sought to explain the reception of foreign law and its effects in developing countries. The taxonomy is based on the “source of social behavior that plays a leading role” in legal systems. The patterns of the law that were identified were the law, politics and tradition (Mattei 1997:13). The criterion to classify a legal system is the relevance of a pattern without excluding the existence of others. The categories of the taxonomy are: the “*rule of professional law*, *rule of political law* and *rule of traditional law*” (Mattei 1997:16). The first pattern is characterized by the separation between law, politics and religion or “philosophical tradition” (Mattei 1997:23). The second pattern is characterized by the lack of a clear separation between law and politics. It is subdivided in law of transition for East Europe and law and development for Africa and Latin America (see also Staton 2004:5), but acknowledging that more developed countries in Latin America may be in the pattern of professional law in the urban areas (Mattei 1997:28, 33). The third pattern is linked to religion and is sub divided in Far Eastern countries and Islamic Law (Mattei 1997:27,41).

¹²⁷ Industrial policy is rejected in favor of the creation of a legal framework (Cooter and Schäfer 2004:12).

¹²⁸ It is recommended that traditional approaches to development based on public law, be replaced by a private law approach, minimizing the presence of the state in the economy and decreasing the role of regulations and administrative law (Krugman

approach puts more emphasis on private law, training of staff, and transplanting laws (Cooter and Schäfer 2004:30).¹²⁹

According to Miller (2000:15), judicial adjudication that takes into account social policies and seeks redistributive policies, does not necessarily improve the situation of poorer citizens. A social conservative but instrumentalist judiciary may be more dangerous than a judiciary that applies the law mechanically (Miller 2000:15). When a legal system promotes “sensible adjudication”, i.e. the judiciary is asked to respond to social needs, it becomes “charismatic” because judges are supposed to harmonize competitive social and governmental interests and to promote democracy, although they do not have special capacities to change the rules (Miller 2000:17,19). Their use of citations is seen as a way to maintain the charismatic power, because when textual restrictions disappear, judges may use their personal views of social needs and take positions in political, economic and social questions. As a result, other branches may decide to nominate justices of the same political party, a situation which is particularly dangerous in developing countries where social and economic questions are more frequent (Miller 2000:20-1). The tendency in many developing countries is to adopt “ideal” norms, “impossible to obey but easy to promote” in an open interpretation of the constitution (Miller 2000:97).¹³⁰ Developing countries should find a constitution and institutions “that complement and reinforce one another” (Mueller 1999:119-20)¹³¹.

According to Herdegen (2006b:848), the global trend of using discretionary competences to choose the methodology and to adjust the parameters of interpretation to the context, may produce memorable or even dangerous constitutional case law. Accountability is recommended by means of “the reserves of interpretation” inside and outside the Constitution. The challenge is to design objective criteria to limit the competences of constitutional courts to interpret, particularly in cases where the effectiveness of rights and constitutional principles leads to striking down or conditioning economic reforms (Palacios 2001b:17-9). However, the risk of regulating judicial discretion is that the regulation will also be interpreted in a

1994; Adelman 1999, quoted by Cooter and Schäfer 2004:18). The state should not lead economic growth in developing countries for the same reason as it should not lead it in rich countries; state employees lack both motivation and information (Cooter and Schäfer 2004:25).

¹²⁹ One of the critics of this approach and of the Neo-institutional approach is that other rights than security and property rights are excluded, whereas participatory rights, for example, “explain a significant amount of variations in human development indices across countries” (Bardhan 2005:66).

¹³⁰ Examples of more activist modern Constitutional Courts are Hungary, South Africa, India Supreme Court, Korea and Colombia; they are supposed to promote the politization of judicial conflicts (Uprimny and García 2001).

¹³¹ Along the same lines, Law and Development of the 1960s and 1970s, supporting legal instrumentalism as a tool for economic development and social change, was considered as a failure (Miller 2000:96).

discretionary way (Palacios 2001b:9). Nevertheless, the design of extra-constitutional parameters to limit constitutional adjudication as: (i) international law standards; (ii) comparative law; (iii) empirical parameters, and (iv) the historical context of the constitutional rules (Herdegen 2006a:71-6; 2006b:848) is proposed. However, the dilemma is that these parameters are precisely those employed by courts to balance.

The public choice approach considers that the behavior of judges can reflect their own agenda or an agenda imposed by pressure groups (Palacios 2001b:10-11; Kugler and Rosenthal 2002/2005)¹³² and therefore, the judiciary cannot seek to realize the ideals of the Legal Social State because even Congress and government do not (Palacios 2001b:10-11). Therefore, in a representative democracy, conflicts concerning social interest should be analyzed and, if possible solved by the legislative (Herdegen 2006a:73). Hence, courts should not adjudicate by ordering budget allocations or usurping budgetary legislative competences (Herdegen 2006a:74).

2.4.3.1 The particular situation of Latin American constitutional law

Jl in Latin America has traditionally been qualified as weak (Burgos 2003:7). The judiciary has been reforming and increasing its institutional relevance, helped by international cooperation. Formal Jl has been achieved through constitutional and legal reforms, referring basically to the creation of Constitutional Courts and the Councils of the Judicature (for internal management of the branch), and the reform of the appointment procedure, judicial career and budget (Burgos 2003:8, 24-6).

Schor (2006a:15) considers that Latin American constitutions were supposed to institutionalize liberalism but they failed because of the high social inequities¹³³. Other structural problems have been the control of the judiciary by the executive branch and gross violations of fundamental civil liberties. Ackerman (1997:795-6) added that the possibilities of institutional conflict are higher in the presence of charismatic presidents together with an independent legislative. However, Latin American Constitutional Courts are

¹³² The interpretation of its own competences may reveal the hidden motivation of its decisions. The analysis of rulings in which courts try to extend the scope of its own competences to increase its social and political importance or to accept pressure group opinions, may be relevant (Palacios 2001b). For instance, in Colombia, a study concluded that the Constitutional Court favors the interests of the users of public services, but it did not conclude that those interests coincide with those of the judges (Kalmanovitz, 2001:153-6).

¹³³ In some cases, constitutions were seen as a façade for dictatorship; the judiciary is considered as an institution that may benefit from disputes between the legislative and the executive, although in the case of Latin America, the military has replaced in many cases the judiciary, using the same justification: “the ultimate safeguard of the nation’s fundamental principles endangered by squabbling politicians”. The difference is that the judiciary justifies its role in the “internationally-recognized norms of human dignity while the military tends to militarize society at the expense of these norms” (Ackerman 1997:790-1).

perceived as capitalizing on the fragmentation of the political system, despite the variety of models of constitutional adjudication present in the region (Navia and Rios 2005:196-200).

Some studies found that the political legitimacy (in terms of independence and impartiality) of Constitutional Courts in Latin America is also threatened by different problems of the judiciary. These have been identified as follows: (i) the selection of judges is normally discretionary and the dismissal through the impeachment is frequently a “political judgment”¹³⁴ (Sagüés 2004 4-5); (ii) Latin American constitutionalism has not been independent from politics, and the enforcement of constitutional guarantees may be threatened by political pressure (Schor 2006a:1,11); (iii) the lack of institutional capacity of other political powers (Sagüés 2004:11-13); (iv) the gap between law in books and law in action is bigger in Latin America than in other legal orders. Although the constitutions were drafted on the US model, the gap between written constitutions and reality depends also on how they were socially constructed and how they are respected by elites (Schor 2006a:5-7). A constitutional text does not transform political practices to limit political power, i.e. the copy of an institution does not guarantee the result because it can be transformed in the process (Schor 2006a:14). Precisely, the reforms generally failed due to the lack of capacity to transform the structures of power (Schor 2006a:26).¹³⁵

Modern Latin-American constitutions¹³⁶ are generally very long and detailed, which complicates comparison (Miller 2000:6). In the XX century, these constitutions included a vast number of social guarantees, adding more length to those texts (Schor 2006a:21). In the region, the challenges are not “whether constitutions should be judicially enforced, but how constitutions become entrenched against political inroads” (Schor 2006a:36).¹³⁷ These constitutions are also characterized by an “intense constitutional experimentation”, seeking to control presidential power, regulate decentralization, and empower courts and constitutions. In addition, judicial reforms follow the worldwide trend of the “global expansion of the judicial power”, justified to push democratic transformations in developing countries. The

¹³⁴ See Inter-American Court of Human Rights: “Tribunal Constitucional de Peru” /1999, which analyzed the due process in case of dismissal (San José Pact (8)), quoted by Sagüés (2004:11-3).

¹³⁵ One aspect is court congestion, which affects the quality of the sentences, because of the lack of resources, but also because auxiliary personnel produce sentences (Sagüés 2004:7-8).

¹³⁶ The characteristics of Latin American Constitutional Courts are also described by Nogueira (2003).

¹³⁷ E.g. in Brazil, the government of president Cardoso sought to limit adjudication of lower courts with respect to economic reforms in line with the globalization process. A judicial reform adopted the binding precedent of the Supreme Federal Tribunal and therefore, the government had only to influence the latter. The result was a sort of informal negotiation by the executive with the Supreme Tribunal before the presentation of the economic reforms to the Congress, to avoid unconstitutionality but also to guarantee substantive adjudications with binding force to lower courts (Ballard 2003:406-7).

opponents consider that this empowerment affects the respect of the citizens for the constitution and the competence of legislators to solve “pressing problems” (Schor 2008b:1-3). Nevertheless, the dominant position links JI in Latin America to the democratization of the states.¹³⁸

Mexico and Colombia are presented as examples of those trends, empowering high courts as a way to consolidate democracy.¹³⁹ Schor (2008b:1-3) concluded that the agenda of the Colombian Constitutional Court is more ambitious than the one of its counterpart in Mexico and that judicial activism is a crucial institution to push democratic transformations. However, other opinions found that case law of some Latin-American Constitutional Courts concerning the justiciability of ESC rights are based on the Neo-constitutionalism approach and as a result, case-law may be an extra-limitation of competences and a sort of politicization of the justice, seeking to legislate without democratic representation and privileging personal preferences disguised as “pseudo-scientific postulates” (García A. 2007:22).

Precisely, with respect to the adoption of methods of interpretation, Latin American legal positivism is considered as a mixture of the theories of Kelsen and Hart which, in some circumstances, allow judicial discretion (López 2004:34-7; Kennedy D. 2004:XVIII).¹⁴⁰ The first North American analysis of the Latin American legal philosophy concluded that in the first part of the XX Century Latin America experienced a strong continental European influence, particularly from Germany and Austria (Kunz 1948, quoted by López 2004:26), i.e. local law systems (systems of reception) developed the legal theories of the systems of production in a distortionary way (López 2004:34-7). A study on the import of the two standard methods of balancing (the European and the North American) in Mexico and Colombia concluded that the models were “tropicalized”, adjusting them to their countries and adding new elements (Conesa 2008:2).¹⁴¹ The Colombian Court explicitly cited comparative law, particularly German and US doctrines, whereas the Mexican Court adopted the Colombian model without citing it expressly (Conesa 2008:16).

¹³⁸ In this respect, the support by public opinion becomes highly relevant to the judiciary. The Latinobarometer showed that in the period 1996-2001 only 26% of the citizens had some degree of confidence in the judicial system (Navia and Rios 2005:194-5). In Mexico, an analysis of the “link between the jurisprudential choices judges make and their decisions to publicize their choices” shows that the judiciary is highly influenced by public support and acts “strategically”. The judiciary tends to inform the public about decisions annulling public policies but less about decisions supporting them. Public relations are therefore a method used to increase judicial institutionalization, despite the risk of being evaluated as a politicized branch (Staton 2004:3, 23-4).

¹³⁹ Colombia is referred to as an exceptional case in Latin America because democracy has been stable during the XX century, with only one dictatorial interruption of five years. But this contrasts with “the overly powerful presidents, inequality, and violence”. It is also the country with the most profound constitutional transformation (Schor 2008b:10-1).

¹⁴⁰ On the reception of the theories of Kelsen in Colombia, see López (2004:341-98).

¹⁴¹ The Mexican Court is supposed to have a traditional background and the Colombian Court is considered the most progressive in Latin America (Conesa 2008:1-2).

2.4.4 Colombia

The particularities of the Colombian case, presented in different studies, are summarized here in order to put the present research in context. Two tendencies in Colombian constitutional adjudication have been identified: the “traditionalist-positivist” tendency that does not differ from statutory interpretation and the “new constitutionalism” that uses a broad interpretation of constitutional principles. The hypothesis put forward is that the first tendency is dominated by judges following a judicial career whereas the second is pushed by judges mostly coming from academia. Whereas the Supreme Court of Justice followed the first tendency before the P.C. of 1991,¹⁴² the Constitutional Court followed the second, based on “Dworkin’s theory”. It tries to impose the *stare decisis* doctrine and introduced conditioned and integrating rulings to strengthen the law-making role of the judiciary (Landau 2005; López 2000; Cepeda 2004b).

The P.C. of 1991 has been categorized as “aspirational”, in contrast to “protective” constitution. The (sociological) characteristics of aspirational constitutions are the maximization of objectives through rights and principles and the promotion of judicial activism, whereas protective constitutions consider constitutional rights as political questions of the Congress. Aspirational constitutions normally show an enormous difference between their objectives and social reality, and therefore seek to improve these realities (García V. 2004b:3-4).¹⁴³ In fact, it has been recognized that in the P.C. of 1991, the rights catalogue and the judicial mechanisms to protect them were increased, mainly by the creation of the Constitutional Court (Cepeda 2004b, quoted by Schor 2008b:1-3). This Constitution promotes less accountability to allow the Court to play a role in the construction of democracy, because a very independent court may not have incentives to act in this way, as occurred with the Colombian Supreme Court before 1991 (Cepeda 2004b, quoted by Schor 2008b:13).¹⁴⁴ This study affirms that concrete judicial review (APFR) and the method of rights analysis (balancing) empowered the Court to protect rights of social groups excluded from political power. This way, the APFR has more democratic relevance than abstract judicial review, because citizens have the possibility to present claims, creating a sort of political

¹⁴² The constitutional case law of the Supreme Court was judged as too formal, eroding rights protection and increasing the distance between constitutional rules and reality (Cepeda 2004b, quoted by Schor 2008b:1-3).

¹⁴³ García V. (2004b:6) added that the EAL in Latin America opposes aspirational constitutionalism and supports restrictive constitutionalism, leaving ESC rights in the sphere of the legislator. He further argues that the reception of EAL and Neo-institutionalism in Latin America follows the hypothesis that the interaction among the actors in the market is more or less egalitarian, which does not correspond to reality. (García V. 2004b:119-20).

¹⁴⁴ The P.C. of 1886 did not allow the justiciability of rights. It was based on the French model and the aim of judicial review was not the defense of fundamental rights (López 2006b:6).

capital for courts, a culture of rights and putting case law in the center of the political debate. Therefore, the Constitutional Court displaced legislators as main guardians of rights and abandoned legal formalism as method of interpretation (Schor 2008b:14). This analysis supports also the hypothesis that this change is related to the academic background of justices, who had the ability to follow the worldwide tendency of balancing and promote transnational and socially focused rulings.¹⁴⁵ The Colombian Court is therefore placed in the Latin America vanguard of the justiciability of rights, because it has been “deepening the social basis of democracy” in a country with high inequalities (Schor 2008b:15). However, it clarifies that positive experiences of courts “enhance democracy by enforcing procedural protections” but in contrast, if courts strongly enforce substantive protections they may damage the system, because elected officials should promote democracy and not the courts (Schor 2008b:18-9; see also López 2004:414).

The study concludes that judicial activism is not more dangerous in developing democracies because it attracts lawyers educated under “the progressive Warren Court” and because “courts provide better democratic outputs when they have a pragmatic, flexible approach rather than a formal approach to interpreting constitutional guarantees” (Schor 2008b:18-9).¹⁴⁶ Judicial activism in Colombia is also justified by “the crisis in representation and the weakness of the social movements and opposition parties”.¹⁴⁷ Moreover, the enormous political fragmentation in Colombia is a strong argument to defend the judicial activism of the Colombian Court because the other powers have not had the capacity to threaten its institutional stability and the Court felt supported by the public opinion (Uprimny and García 2001).

Although the Colombian Constitutional Court is considered one of the most notorious cases of judicial activism in Latin America, it is not a generalized opinion that this activism is one of the main contributing factors to the welfare of the country (Herdegen 2006a:67-8). In fact, the complexity of economic regulation and ESC rights constitutes a challenge for constitutional case law argumentation (Clavijo 2001c, 2004a, 2004b; Kugler and Rosenthal 2005). Moreover, the excessive use of judicial discretion by the Constitutional Court, ruling more on the basis of arguments than on factual evidence, is seen as an incentive for pressure groups to try to capture it (Palacios 2001b:7-14). Judicial activism of the Court is also made responsible for the “constitutionalization of the daily life” in Colombia, creating the image that constitutional rules changed

¹⁴⁵ Another analysis of the behavior of justices sought to identify the effect of their personal ideology on their rulings (GDIP 2007).

¹⁴⁶ The transformation of case-law in Colombia, using as parameter the North American system, has been seen as a way to promote judicial activism (Rodríguez G. 1999:32).

¹⁴⁷ For a historical overview of those circumstances, see Uprimny and García (2001).

social reality with an “anti-hegemonic character”. An instrumentalist evaluation of constitutional case-law (supporting a separation between law and society), shows the failure of their purposes because neither peace nor lower social inequalities were reached (Restrepo E. 2002:2-5). However, this analysis shares the idea that case law has gained importance because of the weakness of the other powers (Restrepo E. 2002:8) and it has favored the emergence of social movements that have reached social objectives, as in the case of housing, health and salaries (Restrepo E. 2002:10-2; Uprimny and García 2001).

Foreign citation in Colombia was analyzed by López (2004). He stated that “anti-formalism” in Colombia was introduced by the Constitutional Court, applying a “new version” of Kelsen’s theory¹⁴⁸ and a “Latin American” version of the theories of Hart, Dworkin and Alexy, and that most of the main Colombian authors of this reception have been law clerks of the Constitutional Court (López 2004: 416-7). An analysis of justices during the 1991-2003 period concluded that Hart¹⁴⁹, Dworkin and Alexy are indeed the authors who are most frequently cited by them. Some justices had a clear and coherent citation pattern, whereas others tried to combine some of these theories, (e.g. C179/94 Hart-Alexy), and as a result it was not feasible to present a clear tendency for the Court as a whole (López 2004:436). Another interesting finding was that when the Court sought to put fundamental rights above the legal order, it based its arguments on authors like Radbruch, Holmes, Frank, Cardozo and Hart (López 2004:444). López concluded first, that the reorganization presented by Recansens Sichez, trying to privilege the importance of the judiciary, is a clear influence (López 2004:444), and second, that the use of principles alongside rules based on Dworkin and Alexy has also been systematically integrated by the Constitutional Court (López 2004:454-7). Notwithstanding, another analysis concluded that Colombian constitutional case law adopted the “Hartian” position on rules and principles and abandoned the “Dworkinian” perspective (Rodríguez 1999:31).

More concretely, the application of the balancing method by the Colombian Constitutional Court has been analyzed with contradictory hypotheses and conclusions. A first study states that the Constitutional Court seeks to give a normative character to constitutional principles through the binding force of case law but also through jurisprudence, mainly based on the German model (López 2006b:4,7-8). The use of this balancing method is justified by the need to highlight other constitutional principles besides those of the Legal Social State (López 2006b:52). The Court is said to be a political body trying to enforce its position

¹⁴⁸ Recansens Sichez propagated Kelsen’s theory in Latin America (López 2004:428-34).

¹⁴⁹ The influence of Hart in the Constitutional Court is developed by López (2004: 443)

through the introduction of vertical precedents and the use of “tests” in the balancing judgment of conflicting rights (López 2006b:55-6). The use of the balancing method sought to diminish the influence of textualism, historicism and systematic interpretation (López 2006b:74) because textualism is not adequate provided that constitutional principles are undetermined and their scope is given by moral and political contents that may not be interpreted by this method. Originalism and legislative history, highly used in the US to avoid judicial discretion, is not applicable in Colombia because both the P.C. and the Proceedings of the National Constituent Assembly are so recent. As a result, instead of reviewing the original intent of the articles, it is possible to examine the positions of different groups that participated in the Assembly. The Court has used this method but it has also been questioned in dissenting opinions (López 2006b:44-6). Therefore, the purposive and systemic interpretation is the recommended method for constitutional adjudication (López 2006b:47). López considers the US model as a guide for the balancing method and the “reasonability test”. He also supports the use of the “equality test” and the theory of intensity on these tests, because these procedures promote the ‘objectivity of constitutional adjudication’ ‘defended by Dworkin and Alexy’ (López 2006b:74-81).¹⁵⁰ This study is an example of the complexity of case law transplant and the way it has been integrated into Colombian constitutional case law. It is part of a training course for the judiciary and it is almost completely based on a US bibliography, although it also extensively quotes case law (C022/96), which mainly refers to German and European human rights case law (López 2006b:83-6). López (2006b:92) concludes that the Colombian constitutional case law works on ‘jurisprudential lines’ along which “sub-rules of constitutional law” have been created and presented as “law” to the judiciary. He recalls that the binding character of case law was accepted in Colombia by C037/96, based on a re-construction of the concept of “constitutional doctrine” and the use of the equality principle of the P.C. (13).¹⁵¹ C836/01 extended the doctrine of the precedent to other high courts (Council of State and Supreme Court of Justice) (López 2006b:110,129-30). However, this opinion is not unanimous because other judicial opinions reject the binding force of precedent.¹⁵² This study adopted one of the multiple common law techniques to be taught to Colombian judges (López 2006b:132,143-4), in an attempt to create a theory of the Colombian precedent as a mandatory source of law.

¹⁵⁰ In addition, he refers to the work of McCormick and Summers (1997:532-8) to justify the binding force of the precedent in continental systems (López 2006b:107-8).

¹⁵¹ According to López (2006b/2000-4), C131/93 introduced the doctrine of the precedent with a confusing methodology to identify it, and citing as theoretical sources British rather than US theorists.

¹⁵² An empirical analysis of sentences of the three high courts for 2003 showed that more than half of the sentences of the Supreme Court of Justice did not quote any case law, whereas the Council of State did it in a 36% of the cases and the Court only in 10% of the cases. The legal basis for adjudication in the Court was 17% whereas in the other two courts it was more than 75%. The conceptual citations are the preferred sources for the three courts (around 50%) (López 2006b:155-9).

The balancing method is made responsible for the increasing number of justiciable rights and the direct application of the P.C. above statutes. Therefore, it is also responsible for the escalating conflict between the Court and the economic regulator. However, López (2006b:50-2) assumed that over the last years the Court has been rectifying its vision on the Legal Social State under economic restrictions. In contrast, Uprimny and Rodríguez (2006:7-10) argue that the P.C. recognizes the normative force of ESC rights and imposes normative restrictions on economic policy, i.e. the design of economic policies should respect those rights. They defend the constitutional control of economic policies by way of the reasonability test; this means that the Court should not only analyze whether the objectives of a reform respect the P.C. but also that the means are “potentially adequate” for these purposes (Uprimny and Rodríguez 2006:7-10).

By contrast, a former justice of the Court criticized the way in which the balancing test has been applied because the Court confuses and mixes the European proportionality test with the American equality test (Araujo 2006:853). He argued that when the Court applies the proportionality test, it analyses the means but not the necessity of the reforms and, therefore, it should have declared many reforms as unconstitutional. He added that the analysis should also include a “cost/benefit analysis”, weighing the benefits of a reform against the limits imposed by the rights (Araujo 2006:853). He opposes the use of US jurisprudence in reference to the equality test because the context of Colombia is highly different and because constitutional control should always consider the bases of the Legal Social State¹⁵³ (Araujo 2006:859,868,871; see also Uprimny and Rodríguez 2006:6-7). The use of the “intensity test”, based also on US case law, which proposes flexible control in economic, fiscal and international matters, is judged as arbitrary because it is not established in the P.C. (241) and the Court lacks the competence to regulate this procedure (Araujo 2006:871-2).¹⁵⁴ This author concludes, first, that the Court is using the reasonability test not only to limit legislation, but mainly to implement “axiological emptiness”. As a result, the reasonability test is a powerful tool that enables the Court to use discretionary competences to create legal emptiness. Secondly, interpretation based on values and principles lacks definition and hierarchy and it therefore causes legal uncertainty (Araujo 2006:873-4,877).

¹⁵³ The Court places the goals of the Legal Social State at the top of the aims to be considered in any constitutional interpretation and are given preference over other principles such as the respect for private rights (López 2006b:49-50).

¹⁵⁴ The use of the criterion of efficiency is also considered as discretionary (Araujo 2006:875).

A more recent study concluded that the Colombian court applied the “reasonability test” seriously (Conesa 2008:8). It is a “European inspired reasonability test that links equality to proportionality in the German sense”. However three types of tests were distinguished in Colombian case law: “a European test which is based on proportionality with equal intensity; an American test that distinguished different levels of intensity, and a combination of the two” (C093/01, quoted by Bernal (2002: 5, 8, 13), quoted by Conesa 2008:9). It is a ‘tropicalized’ model, combining the two standard models, but which is not necessarily seen as negative (Conesa 2008:10).

Having presented an overview of the most relevant theoretical literature for this thesis, the following chapter will analyze the main actors involved and their acts and behavior.

3 Mapping the Actors

3.1 Introduction

Before developing the jurimetric analysis in chapter four, a qualitative analysis of the relevant actors, as well as their actions and their interrelations is presented. First, the constitutional context is described to highlight the role of each actor and the legal scope of their relevant actions. Second, the conceptual developments, the institutional framework and the international context of each of these actors are presented, seeking to better understand how they have interacted in the Colombian legal system. Although this chapter is descriptive its aim is to allow a better understanding of the following chapters and to put the Colombian case in perspective, showing its relevance for other developing countries.

As it has been mentioned before, Colombia has been receptive towards recent developments in constitutional systems internationally. Particularly, it has been permeated by the growing phenomenon described in the literature: that in civil law systems, case law is putting pressure on the law and its application, in an attempt by courts to create a system of precedents as in the Common Law systems (Ruiz 2000:149). Together with the emergence of the constitutional rights in the discussions on public and economic policies, a series of interactions are created between national and international organisms with often unclear competences and functions.

In Colombia, one of the more debated institutional developments concerning fundamental rights has precisely been the P.C. of 1991 which included 101 articles on constitutional rights which “defin[es] a highly ambitious social agenda that has helped brand the new Colombian State a social state of rights [...]”. The former P.C. of 1886 only included 36 articles referring to fundamental rights (Giugale et al., 2003: 900). In addition, the Constitutional Court case law ruled that the fundamental rights catalogue is open because the P.C. (93) sets out that international human rights treaties ratified by Congress prevail over national rules. But, rights and guarantees listed in the P.C and in international treaties are not the only ones, because those “inherent to the human being, are not expressly mentioned in them” (P.C. (94)) and should be considered by the Court. Table 3.1 presents the main human rights treaties signed by Colombia.

Table 3.1: Status of major international human rights instruments signed by Colombia and Status of fundamental labor rights conventions

Convention	Ratification
International Convention on the Prevention and Punishment of the Crime of Genocide 1948	1959

International Convention on the Elimination of All Forms of Racial Discrimination 1965	1981
International Covenant on Civil and Political Rights 1966	1969
International Covenant on Economic, Social and Cultural Rights 1966	1969
Convention on the Elimination of All Forms of Discrimination against Women 1979	1982
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984	1987
Convention on the Rights of the Child 1989	1991
Freedom of association and collective bargaining	
• Convention 87 a	1976
• Convention 98 b	1976
Elimination of forced and compulsory labor	
• Convention 29 c	1969
• Convention 105 d	1963
Elimination of discrimination in respect of employment and occupation	
• Convention 100 e	1963
• Convention 111 f	1969
Abolition of child labor	
• Convention 138 g	2001
• Convention 182 h	2005

NOTES: Information is as of 1 July 2007. a. Freedom of Association and Protection of the Right to Organize Convention (1948) b. Right to Organize and Collective Bargaining Convention (1949). c. Forced Labor Convention (1930). d. Abolition of Forced Labor Convention (1957). e. Equal Remuneration Convention (1951). f. Discrimination (Employment and Occupation) Convention (1958). g. Minimum Age Convention (1973). h. Worst Forms of Child Labor Convention (1999). **Source:** http://hdr.undp.org/en/media/hdr_20072008_en_complete.pdf
 Human Development Report (2007: 347-350)

As it was presented in Chapter 2, Colombia is commonly quoted as an example of constitutional judicial activism in the protection of fundamental rights. The P.C. of 1991 seems to facilitate this situation, because as some studies believe, the distance taken from the legal formalities (as the P.C. (228) itself states), “the adoption of broad definitions of standing, the removal of many barriers to access, and the relatively quick resolution of cases” are the main skills to reach a satisfactory rate of right empowerment by the judiciary (Wilson 2009: 61). The type of legal system seems not to be of high relevance in the extended protection of rights, but rather the rules regulating the access to courts (Wilson 2009: 61).

This ample recognition of constitutional rights was complemented with the creation of the Constitutional Court in the P.C. of 1991 (Uprimny, Rodríguez and García 2004:263). The wide constitutional case law developing constitutional rights is seen as a form of judicial activism, justified in a situation of “emptiness of power” created by legislative and executive omissions (Perez 2007:14). As a consequence, arguments concerning constitutional rights are becoming highly relevant in processes seeking to strike down or defend statutes, and the economic reforms are no exceptions. D2067/91 (22) and L270/96 (46), Statutory Law of Justice Administration (SLJA), ordered the Court to analyze the challenged laws on the basis of all articles

of the P.C., particularly those of Title II of the P.C.¹⁵⁵, contrary to other systems where the use of general principles of justice, freedom, equality and morality to decide judicial review cases is not allowed (Kelsen, 1928:131; quoted by Ruiz 2000:148).¹⁵⁶ Therefore, rulings striking down a statute may be based on the violation of any constitutional norm even if it has not been quoted in the challenge.

Previously, constitutional issues were the competence of the Supreme Court of Justice (Cassation Court) which had a specialized chamber of constitutional affairs since 1968 (L.A.01/68 (76) (Rodríguez 2000:228). Before 1957, justices of the Supreme Court of Justice were appointed by the Congress from three candidates (*ternas*) proposed by the President. In 1957, the Military Junta decided that justices should have life tenure (until the age of pension)¹⁵⁷ and be elected by a system of cooptation, seeking to avoid political influence which was accused of the violence in the past years (Charria 1988, quoted by Uprimny, Rodríguez and García 2004:242-3). In 1968 the tenure was established until the age of forced retirement (65 years old). The independence of the constitutional jurisdiction was a source of debates on the protection of constitutional rights and the relation with the political powers and therefore, this system was modified in 1991 to seek a closer contact between the Court and social reality and to renovate the judicial adjudication. According to some observers, critics of the traditional orientation of Courts were systematically not appointed (Uprimny, Rodríguez and García 2004:244).

The judicial review and the APFR are the two constitutional procedures of competence of the Constitutional Court. In the following sections, a contextualization of these procedures as well as the present constitutional regulation in Colombia will be developed in order to clarify the role of the Court in the analysis of the structural reforms adopted under the IMF arrangements.

3.2 International Models of Judicial Review

The institutionalization process of judicial review has been described as a series of waves (Ramos 2006; López 2004; Kennedy D. 2006). Ginsburg identified the first wave with the creation of judicial review in the US. The second wave was the development of Kelsen's theory and the creation of an independent Court.

¹⁵⁵ The P.C. (Title II) regulates constitutional rights, guarantees and duties. The rights are classified as fundamental rights (chapter 1), ESC rights, (chapter 2) and collective and environmental rights (chapter 3). Chapter 4 regulates the protection and enforcement of these rights.

¹⁵⁶ In Kelsen's view, any indeterminacy of the Constitution was a matter to be resolved by the legislative, and not by the judiciary, and principles were thus excluded from adjudication. This supremacy of the legislative was not shared by the US System which gave supremacy to the judiciary (Prieto 2000:1701).

¹⁵⁷ Legislative Decree 247/57 and 251/57.

He clarifies that despite the generalized view that this corresponds to the European model, only “post fascist” countries adopted it: Austria, Germany, Italy, Portugal and Spain, because of the need to define fundamental rights and to limit public powers. It expanded afterwards to other countries mainly to protect fundamental rights. The third wave corresponds to the fall of the Berlin Wall which extended the wave to Eastern Europe and Central Asia as well as to other countries in Africa and Asia (Ginsburg 2008:4). The establishment of judicial review in the US¹⁵⁸ at the beginning of the 19th century had an important impact in Latin America, although not immediately. It was not the only influence neither, because the ‘constitutional court’ model formulated by Kelsen early in the 20th century was also relevant (Prieto 2000:1701).

This explains why many countries implemented judicial review after World War II (Schor 2008a:259,263), but there is no consensus as to the preferred constitutional model of judicial review or on the establishment of a specialized constitutional tribunal. It has been largely affirmed that the expansion of the “principle of constitutional review” is a result of the paradigms of the rule of law and the separation of powers, which have been broadly established in the main international human rights treaties (Autheman 2004:2-3). However, the main models of constitutional review continue to be the European and the American ones, whose main differences are the centralized or, otherwise, diffuse nature of the control of constitutionality and therefore the creation of a supreme court (sometimes with a specialized constitutional chamber within the court) or an independent constitutional court (Autheman 2004:3). However, in academia there are diverse opinions as to which of these models is more prevalent worldwide.

US judicial review is considered to have influenced even European continental law, where the absolute discretionary competence of the legislative has been reassessed due to the implementation of constitutional principles (Prieto 2000:172-3).¹⁵⁹ Moreover, the US legal system is possibly the most significant source of inspiration for the worldwide expansion of judicial review as a means for controlling the other powers. “[T]he rise of transnational jurisdictions”, i.e. the growing importance of international financial institutions at the international level, as well as the power of US law firms on issues regarding the

¹⁵⁸ Judicial review in the US is defined as “the power of any court to hold unconstitutional and hence unenforceable any law, any official action based on a law, or any other action by a public official that it deems – upon careful, normally painstaking, reflection and in line with the canons of the taught tradition of the law as well as judicial self-restraint- to be in conflict with the basic law – in the United States, its Constitution” (Abraham 1998:300).

¹⁵⁹ According to this position, the rejection of the assumption of the rational legislator through the creation of judicial review has contributed to the expansion of the US system (Lopez 2006b:38).

“globalized economy and the non-profit NGO sector” are phenomena identified as strongly influencing the expansion of this legal system (Kennedy 2006: 69-70).

Within the general European model, the Austrian and the German models (in that order) have been the most influential worldwide (Ginsburg 2008). The German Constitution created a modern form of judicial review that focuses on the protection of rights as the main goal. Judicial review seeks therefore to avoid the implementation of policies that are contrary to the constitution, thereby affecting the traditional separation of powers (Tushnet 2008b:20; Schor 2008a:265-6; Grey 2003:7). Although the influence of US judicial review is accepted worldwide, the difference is that this “European” judicial review seeks mainly to protect rights and consolidate democracy (Schor 2008a:287; Epstein, Knight and Shvetsova 2001¹⁶⁰). For many observers, jurisprudential and case law developments worldwide have moved closer to the German model, mainly due to the generalized adoption of the balancing method of adjudication, the enforcement of constitutional rights and the power to declare legislative omissions as unconstitutional (Wessel 1952:164 quoted by Bazán 2007:125). The latter seeks to make the legislative responsible, without any specific and mandatory mechanism of enforcement; enforcement depends therefore on legislative action, which usually should legislate even if the rulings declaring the omission may extra-limit the competences of the judiciary. According to some opinions, the most important incentive to act seems to be “a sheer interest in complying with the constitution” (Tushnet 2008b:156). Others see it as yet another source of tension between the legislative and the judiciary, because it is mainly used by the Neo-constitutionalist approach with a large axiological content (Bazán 2007:136,139)¹⁶¹. This figure on legislative omissions has also been adopted by constitutional case law in Austria, Spain, Italy, Argentina, Hungary, Slovakia, Slovenia, South Korea and Taiwan (Wessel (1952:164), quoted by Bazán 2007:125-27; Ginsburg 2004:232). Some countries have even incorporated this figure in their constitutions, such as in ex-Yugoslavia, Portugal, Brazil and Venezuela (Bazán 2007:127; Tushnet 2008b:155).

Another important influence of the German model is the interpretation adopted when some statutes are considered as unconstitutional but they are not struck down to preserve the caused effects. This is known as the constitutional conformity interpretation (“*verfassungskonforme Auslegung*”) which rules a specific

¹⁶⁰ This article refers to the case of Russia and Eastern Europe

¹⁶¹ Legislative omissions have been classified as ‘absolute’ when a constitutional regulation was not developed by the law and as ‘relative’ when a statute favors some people or groups and excludes others, thus violating the right to equality (Fernandez 1998:116 quoted by Bazán 2007:140).

interpretation of the statute, obligatory to the authorities (Horn 2002:237). In Spain these types of rulings are also accepted: 'interpretative' sentences present meanings of a law and consider also the motivations as part of the decision; and 'constructive' sentences show the modifications needed by a law to be constitutional; they try to control actions and omissions of legislators (Ruiz 2000: 149).

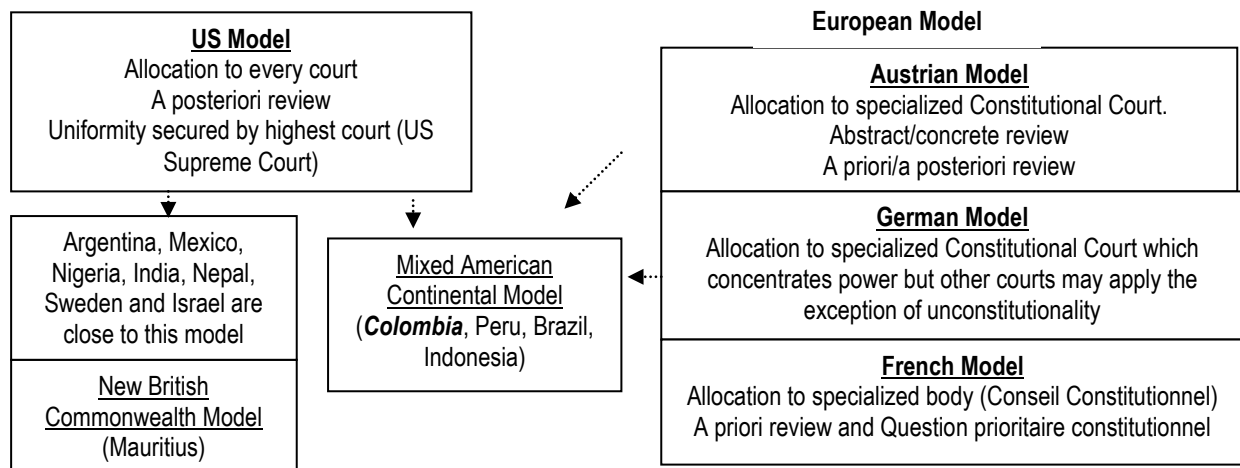
In short, the German model of a constitutional court has lately been more significant worldwide than the US model because a specialized tribunal is often preferred to a high court with constitutional functions, and because few countries choose life tenure for justices (Tushnet 2008a:18; Ginsburg 2008). In addition, modern constitutions, enacted after 1945, generally protect ESC rights, based on "a flexible and pragmatic style of interpretation and enforcement" which seems closer to the German model (Grey 2003:7). This model has been widely adopted in countries with recent democracies and is becoming the most influential model outside the US. Additionally, the German court accepts both abstract and concrete judicial review, a model that has also been adopted by Spain (Ginsburg 2008) and other countries. Another characteristic of the German Court is its open system of litigation (everybody has access to the court) and ordinary judges may also present consultations to the court (Horn 2002:234-5).

The French model is *sui generis* in Europe in which the assumption of the rational legislator has been strongly defended. The Constitutional Tribunal was created as an appendix of the legislative to control whether the judiciary complies with the legislative intention; as a result, the general rule has been that challenges to statutes are only possible before their enactment (Ginsburg 2008:4-5). Judicial review by the *Conseil Constitutionnel* has been seen as a way to improve the policy-making process and justified as a means of avoiding statutory reforms because it enables the judiciary to update laws¹⁶² (Ginsburg T. 2004:226-9). However, this tribunal has evolved in the direction of other European courts as far as the protection of fundamental rights is concerned. This was particularly evident since the incorporation of the Declaration of Human Rights in the preamble of the French Constitution (Horn 2002:223-4; Stone Sweet 1992 quoted by Ginsburg 2008:4-5). The protection of fundamental rights was constitutionally established by the constitutional amendment (61-1) in 2008, and the corresponding Organic Law of 10.12.2009 under the figure of the "*question prioritaire de constitutionnalité*". Any person who is part in an ordinary or administrative process has the right to challenge a legal rule (enacted by the legislative) that may violate

¹⁶² The case of the *référé législatif*, in which the judiciary sends interpretative questions to the Legislative, was suspended in France in 1837, because it caused uncertainty and because of the perceived "political character" of the decisions (Mazeaud, Mazeaud and Chabas 2000:167, quoted by Germain 2003:197; Frydman 2007:5).

the rights and civil liberties granted by the Constitution. However, it is still a very restricted action because it must pass two filters (the competent judge of the process and the Council of State or the Court of Cassation, depending on the jurisdiction) before it is reviewed by the Constitutional Tribunal (see Conseil Constitutionnel 2011: 1-3). Although it represents an evolution vis-à-vis the “dogmas of parliamentary sovereignty” (Stone Sweet 2007: 71), its application is too recent (since 2010) to be evaluated. Figure 3.1 visualizes the models of constitutional revision based on different sources.

Figure 3.1: Typology of constitutional review models.



Sources: Harutyunayn and Mavcic (1999), cited in Feld and Voigt, (2004); Autheman (2004:3-4)

The exponential growth of the importance of judicial review and of the number of countries that include it in their constitutions is presented in a study of Constitutional Courts worldwide (Schor 2008a:273; Grey 2003:1,8; Ramos 2006:103). It found that in 2003 almost 85% of the countries had some sort of judicial review, 46% of them through a Constitutional Court, the remainder through ordinary courts. No evidence was found that Constitutional Courts were less likely in common law legal systems (Ramos 2006:122). In developing countries, the Constitutional Court of South Africa, for instance, has also used judicial review as a means to help resolve non-negotiable conflicts (Klug 2000:180, quoted by Schor 2008a:269). Latin American judiciaries belonging to the civil legal system, are influenced by the Common Law system (US model) (Hammergren, 1998:5), as well as by the Austrian model of constitutional control mainly through the creation of a specialized body to analyze the constitutionality of statutes and the *erga omnes* effects of their rulings (Fix 2001:284). The German model was received indirectly through the Spanish model. Many countries adopted Constitutional Courts to protect fundamental rights. This is the case of Austria, Germany,

Italy, France Spain, Portugal, and outside Europe, in Canada, Israel, Korea, and South Africa. In the US, judicial review striking down statutes that violate rights is as important as striking down violations of the principles of federalism or of the separation of powers (Waldron 2006:1357). In parliamentary regimes, judicial review is, on average, less important than in presidential systems (Ferejohn et al. 2004:12-3).¹⁶³

3.2.1 The reception of institutions in Colombia

Although the Colombian judicial review system is one of the oldest in the world¹⁶⁴, its present structure is not an exceptional case in Latin America. It is generally recognized that Colombia has a mixed legal system with a dominant structure belonging to the continental system but with a non-negligible influence from US constitutional law. Colombia received strong influence from the French Exegetic School in the area of civil law, as well as in the design of the administrative jurisdiction, and this French influence was also visible in constitutional matters before the P.C. of 1991, particularly in the generalized application of the thesis of the “rational legislator”. Case law of the Constitutional Court since 1991 highly debated this idea and the exegetic reading of the P.C. Its jurisprudential and case law developments correspond more to the German and Spanish models, mainly due to the generalized adoption of the balancing method of adjudication.

One of the influences of the US model of judicial review is the diffuse control of constitutionality, performed by any judge in particular cases with limited consequences beyond this case, and known as ‘exceptional constitutional control’ in Latin America (Fix 2001:283; Mueller 1999:119-20; Schor 2006a:7-11; 2008a; Horn 2002:223). A second issue is the possibility of presenting concurring and dissenting opinions in US case law¹⁶⁵ (Oltra1996:159), as also occurs in Colombian Case Law. Thirdly, in Colombia, as in the US, the participation of third parties in the process is also allowed. In the US they are called “the brief Amicus Curiae” and they are considered a means for providing information to the Court but also as a potential source of influence by interest groups (Elhauge 1991-2:78). Figures show that they are presented mainly by civic organizations, interest groups and the government and that they have considerable influence on justices (Abraham 1998:260,263): “it is a partisan brief filed by an outside individual, corporation, governmental unit, or group who is not a litigant in the suit but is vitally interested in a decision favorable to

¹⁶³ Some European countries limit its use and others use it rarely and the political interaction of political parties with the judiciary is thus less important than in the US (Ferejohn et al. 2004:12-3).

¹⁶⁴ Colombia, together with the US, Uruguay, Argentina and Mexico was one of the first countries worldwide that established the judicial review (Ramos 2006:103).

¹⁶⁵ Dissenting and concurring opinions are supposed to seek to detract “from the intrinsic value of the precedent” (Schaefer 2004:109) because they may be seen as a way to undermine the authority of the ruling (Abraham 1998:222, 225). On the opinions of justices, see also Schaefer (2004:109).

the side it espouses” (Campbell v. Swasey, 12 Ind. 70 (1859) at 72 quoted by Abraham 1998:259). Another perspective is that “Amicus curiae briefs sometimes try to fill empirical gaps (...) but these are advocacy documents, not subject to peer review or other processes for verification” and therefore judges cannot entirely trust them and are obliged to follow “their own intuitions” (Posner 2005b:35). A fourth similarity is the institution of Law clerks. They are also considered a court “pressure” group and have even been considered a power “behind the throne”. They are appointed discretionally by justices (Abraham 1998:263-8, Posner 2004b:217), and are capable of influencing the courts’ use of precedents (Posner and Landes 1976:68). Some assessments of their work are not very positive; they have been accused of being responsible for the length and “superficial erudition” of the present rulings of the US Supreme Court (Posner 2005b:35). In Colombia their appointment is also discretionary and although their role has not been the object of study, the conclusions would probably be the same. A fifth similarity refers to the discretionary competences of the US Supreme Court to decide the cases to be analyzed. It has been described as having almost total control “over its docket, deciding in an entirely discretionary way which cases it wants to consider in detail” (Tushnet 2008b:94-5; Oltra1996:159). This is similar to the selection of APFR to be revised by the Court in Colombia, which has been widely criticized because the selection may reflect the specific ideological interests of the Court. Finally, the severability clause, which is generally accepted by the case law of the US Supreme Court, takes the form of modulated rulings in the case law of the Colombian Constitutional Court; these rulings have been understood as one of the manifestations of judicial activism because the Court completes or reforms statutes submitted to its analysis when they are partially struck down. However, the differences are also numerous, the most notorious being the results of the exercise of the judicial review. Abraham (Table 3.2) presented a synthesis of the declarations of (partial or total) unconstitutionality of federal statutes by the US Supreme Court. In two centuries (1789-1997) they amount to 151 (Abraham 1998: 309) which stands in stark contrast with the Colombian Court, which in only two decades of existence has issued a much larger number of rulings.

Table 3.2 Number of rulings of unconstitutionality of federal statutes by the US Court.

Time Span	1798 1801	1801 1835	1836 1864	1864 1873	1874 1888	1888 1910	1910 1921	1921 1930	1930 1936	1936 1941	1941 1946	1946 1953	1953 1969	1969 1986	1986 1997
Number or declarations of unconstitutionality	0	1	1	10	9	14 (15)	12	12	14	0	2	1	25	34	16

Source: Abraham (1998: 309).

The influence of the German model has been more notorious in Colombian constitutional case law than in the text of the Constitution: (i) the adoption of the balancing method to protect constitutional rights and the

possibility to declare the unconstitutionality of legislative omissions. (ii) The German constitutional conformity interpretation is also an antecedent of the modulated rulings of the Colombian Constitutional Court. This figure corresponds to the Severability Clause in the US system. However, a notorious difference with the German Model is the “political question” used by the US Supreme Court of Justice and by the Colombian Constitutional Court to intervene in political issues. This is rejected by the German Court through the adoption of the doctrine of judicial self-restraint (Horn 2002:237), highly recommended to restrain judicial activism.

3.3 The present constitutional regime of the Colombian Constitutional Court

The constitutional regulation concerning the Constitutional Court establishes the following parameters:

- Its main function is the protection of the P.C. through rulings deciding the action of unconstitutionality (judicial review) against constitutional reforms (for procedural reasons), laws and decrees with legal status, and through the revision of the APFR in accordance with legal regulations (P.C. 241).
- The number of justices must be odd¹⁶⁶ and their area of specialization must be considered. They are elected by the Senate for eight years from short lists prepared by the President of the Republic, the Supreme Court of Justice and the Council of State. They cannot be re-elected (P.C. 239)¹⁶⁷.
- The government cannot provide employment to the justices of the Court during the period of their functions and during the year following their retreat (P.C. 245).
- The constitutional case law is not a source of law but “an auxiliary criterion of interpretation” (P.C. 230)¹⁶⁸. However, judicial review sentences constitute *res judicata* and no authority can reproduce the unconstitutional decision while the existing constitutional rules are in force (P.C. 243).¹⁶⁹
- The Court has to communicate to the President of the Republic and/or to the President of the Congress, the beginning of any process against regulations enacted by them (P.C. 244).

¹⁶⁶ Law 270 /1996 (44), established that the number of justices is 9.

¹⁶⁷ Although the issue of the identification of the potential ideological contents of rulings goes beyond the purpose of this analysis, it is relevant to present the results of an empirical analysis of the hidden motivation in the designation of the justices of the Court (Lamprea 2010); the nominations realized by the Council of State are strongly marked by the party affiliation of the candidates (considering only the two traditional parties which are no longer representative); in turn the Supreme Court of Justice takes into account the “loyalty” of the candidates vis-à-vis the Supreme Court, considering the previous ideological disputes between the two courts; in fact, most of the nominees were former justices at the Supreme Court or judges. In the last designation (2009) the political motivation of the President was clearly visible (Lamprea 2010:15-7).

¹⁶⁸ This article was influenced by the Constitution of Spain (117.1) but in Colombia the “probable legal doctrine” was not adopted as obligatory (Lopez 2000:13).

¹⁶⁹ The declaratory of unconstitutionality for procedural reasons does not have *res judicata* status. For rulings deciding on the contents of the law, the situation in Colombia is contrary to the case of common law systems where the inapplicability of a law may be reinterpreted or reproduced in other cases. In the case of the judicial review in the US, it does not repeal the law but through the *stare decisis* principle the sentences have an expansive effect (cf. Saguez, 2004:4).

- The Public Ministry should intervene in all the processes.

3.4 The role of precedent in constitutional case law

Precedent or legal doctrine is defined as the law made by judges that orients the path for future decisions. Legal analysis concentrates mainly on doctrine and its potential consequences, which mostly excludes the social implications. In contrast, social sciences concentrate their analysis on ideology in judicial reasoning (Tiller and Cross 2006:517-20). Not only theoretical contributions present clear divergences on the binding character of precedents but also empirical studies show diverging results (Shapiro 2008:938-40).

Common Law systems are characterized by “judge-made law”, i.e. judges create, interpret and modify the law.¹⁷⁰ The doctrine of the binding ‘precedent’ or *stare decisis* is another characteristic of Common Law systems (Abraham 1998:9). *Stare decisis* is defined as a “principle of policy and not a mechanical formula of adherence to the latest decision” (Abraham 1998:360).¹⁷¹ The huge amount of precedents makes the emergence of a conflict among them likely, because more than one may be applicable to a concrete case, which increases their character of policy decision rather than of strict legal procedure (Abraham 1998:361). Furthermore, some precedents are overruled, not because they are erroneous but because they “become obsolete” (Schaefer 2004:111). Precedent and policy (i.e. the judiciary and the legislative) are required to work together in benefit of the society (Schaefer 2004:111).

Some of the numerous definitions of precedent are presented here. First, it is considered as the aggregate experience of judges, ruling cases on the basis of arguments and evidence, which allows them “to be followed in subsequent cases”. It is thus, “something done in the past that is appealed to as a reason for doing the same thing again” (Posner and Landes 1976:2). Another definition is “a decided case that furnishes a basis for determining later cases involving similar facts or issues” and they may be binding or persuasive (Black’s Law Dictionary 8 ed. 2004, quoted by Lindquist and Cross 2005:3). The requisite that future courts should adopt previous decisions is the cause of the entitlement of the *stare decisis* as a law in Common law systems, but not in Civil law systems, where they lack binding character (Scalia 1998:7).

¹⁷⁰ On the emergence of the precedent, see Fon and Parisi (2004:3).

¹⁷¹ In constitutional matters in the US, the principle of *stare decisis* has had a restrained application (Abraham 1998:360).

“Rules of relevance” seek to give to precedent an appropriate use. However, its discretionary use is evident because it can be ignored by the “distinguishing” skill (Lindquist and Cross 2005:10). It has been qualified as a technique, an art or a game because “what constitutes the ‘holding’ of an earlier case is not well defined and can be adjusted to suit the occasion” (Scalia 1998:7). Textualism rejects the use of precedents because it involves an analysis of the similarity between the present case and an old interpreted case and hence, rules of relevance should be used to conclude whether or not former interpretation covers the new case (Philipse 2007:190). Precedent is also seen as a way to constrain judicial behavior, particularly through the distinction between holding and *dicta* of a ruling.¹⁷² The establishment of a clear parameter to distinguish between these concepts has been one of the obstacles in the application of the *stare decisis* doctrine even in the US (Abramowicz and Stearns 2004:7). Holdings are “those propositions along the chosen decisional path or paths of reasoning that are actually decided, that are based upon the facts of the case, and that lead to the judgment”; the rest are considered *dicta* (Abramowicz and Stearns 2004:1). Holding identification is difficult because of the lack of precise rules to identify it (Abramowicz and Stearns 2004:102), although some criteria were drawn from the definition:¹⁷³ First, the proposition is included “within a case’s holding conclusions that courts explicitly reach”. The methodology used in the case is not part of the holding (Abramowicz and Stearns 2004:116,119). Second, holding should be based on the facts of the case and therefore “hypothetical questions” are excluded (Abramowicz and Stearns 2004:123).

The binding force of precedents may change over time due to the different interpretations and it may only be ignored by the rejection of the theory of *stare decisis* or by its overruling (Shapiro 2008:931). According to Shapiro (2008:957), the generalization of a legal problem before adjudicating is useful in constitutional matters, and this theorization of the case may affect the vote of the justices. It is also susceptible of changes, due to its empirical nature that involves a dynamic process. Defenders of the binding force of precedent stress its positive influence on the consistency of the legal system and on the reduction of moral error (Alexander and Sherwin 2004:1,3). The binding character of horizontal precedents in constitutional matters is not seen as relevant, because the Congress has always the competence to refuse judicial opinions (Paulsen 2000, 2005, quoted by Shapiro 2008:933).¹⁷⁴

¹⁷² Holding is also known as *ratio decidendi* and *dictum* as *orbiter dictum* (Abramowicz and Stearns 2004:96).

¹⁷³ Definition based on Black’s Law Dictionary; it tries to distinguish between holding and *dicta* (Abramowicz and Stearns 2004:142).

¹⁷⁴ For a synthesis of the different views on the *stare decisis* doctrine in the US, see Shapiro (2008).

Critics of the use of precedents highlight mainly that, first, judges may be affected by the “availability heuristic”, defined as the strong influence of a close “highly salient event”, which has a great impact on their reasoning and makes that their rulings are “over-dependent on the particular event and [...] over-estimate the representativeness of that event with some larger array of events” (Schauer 2005:24-25). As a result, precedent design would “systematically overestimate the extent to which those future events will resemble the one that they are now most immediately confronting” (Schauer 2005:26). Second, it is argued that *stare decisis* doctrine is a sort of “useful tactical weaponry in the judicial-majority-forming game”. Precedent is an essential instrument for adjudication, but can also be abused (Paulsen 2008). Third, the use of “legal principles derived from past decisions”, mainly defended by Dworkin, is inappropriate because principles are vague and indeterminate due to the continuing change in rulings (Alexander and Sherwin 2004:15-8).

In the case of Civil Law systems, it has been highlighted that despite that they promote the principle of legal certainty, some legal areas have shown unstable legal practice (Fon and Parisi 2004:1), and one of the reasons mentioned was precisely the absence of precedents (Mattei 1988, quoted by Fon and Parisi 2004:1-2). Therefore, an informal structure of precedent is promoted in some civil law countries, seeking to improve legal certainty that was not reached through codification, and seeking to increase judicial productivity (management of caseloads) (Fon and Parisi 2004:4).¹⁷⁵ Another opinion is that in civil law systems “judge made law” is not the creation of new rules “from scratch”, but the decision of concrete cases through rulings taken as precedent in future cases. The goal is to reduce the vagueness of statutes and general principles and therefore, to reduce legal uncertainty and to decrease the number of disputes and legal costs (Schneider 2001).

3.5 The judicial review in Colombia

The Colombian Constitutional Court has played an active role in the process of rules creation through the judicial review sentences which have *erga omnes* effects but also through the new constitutional actions, particularly the APFR. The *erga omnes* effects apply only to decisions of unconstitutionality without involving the motivations of the sentence.¹⁷⁶ The abstract control of constitutionality (judicial review) was

¹⁷⁵ This informal structure is called “probable legal doctrine”, applied when many past rulings are uniform in their decisions. Examples of this situation include France, Germany and Louisiana (Fon and Parisi 2004:4). It is also the case in many countries that followed those law systems, such as Colombia (See Lopez 2004, 2006a).

¹⁷⁶ This is also the case of Spain (Article 5.1. of Organic Law of Judicial Branch) and Germany (Favoreau, 1986:23; quoted by Ruiz 2000:147) which served as models for the drafting of the Colombian P.C.

created in Colombia in 1910 and until 1991 it was executed by the Supreme Court of Justice.¹⁷⁷ Abstract constitutional control refers to a control in the absence of a concrete controversy concerning the application of the law to a specific case. The action can be presented by any citizen and the procedural conditions are very simple, the term for the decision is very short and a second instance is not allowed.¹⁷⁸ Despite that the constitutional regulation of judicial review and despite its lack of status as a source of law, this action has been seen as a political competence, with limited negative legislative competences when it strikes down a law but without creating new regulations. However, the Court is accused of usurping positive legislative competences through interpretative methods (Palacios 2001b:7; Kugler and Rosenthal 2005:3-6).¹⁷⁹

During the process of the judicial review, any citizen may support or contest the challenge. Public entities that participated in the enactment of the law may participate in the process. The Court, on the initiative of any justice, may organize a hearing in which the parts can present their arguments. Exceptionally, the reporting justice may invite public entities, private organisms and experts to present an opinion about the relevant questions of the process. The invited experts have to declare any conflict of interest (D 2067/91).

The Statutory Law of Justice Administration (L270/96 (48)) regulated the effects of the sentences but the Court did not accept such regulation (C037/96).¹⁸⁰ It introduced the theory of conditioned (“modulated”) decisions which was explained as follows: “(...) Simply striking a provision down would be tantamount to excluding constitutionally acceptable interpretations from the legal system and striking down a law that could be compatible with the Constitution. Both of these options would lead the Court to exceed the limits of its own functions. A reasonable alternative available for the Constitutional Court is to uphold the provision under review, conditioning its constitutionality on the fact that only some of its interpretations are valid, while others are unconstitutional and must be rejected” (Cepeda, 2004b:565-6). This sort of adjudication may occur (i) when conditioned effects refer to the content of the legal provision, or (ii) when it conditions the effects of the decision in time. The first category was subdivided into (i) ‘interpretative’, when it “determines the meaning that should be given to a particular legal provision (...) or restricts the scope of application or the content of regulations (...)”, (ii) ‘expressly integrative’, when it “expands the law’s scope

¹⁷⁷ On the history of constitutional control in Colombia, see also Charry (1993) and Cepeda (2004b).

¹⁷⁸ This lack of control over constitutional adjudication is interpreted as the way that allows its potential discretionary use by justices (Palacios 2001b).

¹⁷⁹ In Latin America the conflict between court interpretation and legislative interpretation (through interpretative laws that may be declared as unconstitutional) has shown the conflict between two powers with political implications; some cases of impeachment as in Argentina are quoted as examples of these conflicts (Sagüés, 2004:12).

¹⁸⁰ The Court argued its functional independence to decide the effects of its own sentences (C131/93).

of application to new subjects, situations or things not initially foreseen”, i.e. the case of legislative omission in which it applies directly the P.C., and (iii) ‘materially expansive decisions’ which are “all the different types of decision that do not fall under the other categories, but which the Court has nevertheless adopted since 1992 (...)” (Cepeda, 2004b:566). Conditioned rulings referring to time, are those adjudications whose effects do not necessarily start on the date of the decision; they can be “retroactive” (since the enactment of the law or decree with law status) or with “deferred effects” (a specific period after the adjudication) and they have been used “in a discretionary way” (Cepeda, 2004b).

These kinds of adjudications are not based on explicit constitutional competences defined in the P.C. (241) but on the practice of other Constitutional Courts (Palacios 2001b; López 2000:33). The Court has also been using methods of interpretation from the common law such as the techniques of precedent analysis, without considering their implications and theoretical developments (López 2000:104-8).¹⁸¹ This situation cannot be classified as ‘legal transplant’ (Buscaglia, 2005) but rather as ‘case law practice transplant’ as presented in chapter 2. Some authors affirm that the binding character of the precedent, as described, does not apply to the judicial review because these adjudications are not based on facts (López 2000:124-9). *Res judicata* only applies when the argument to attack the substantive article was already examined by the Court. However, the use of precedents in the same way in the US is defended (López 2006b). Moreover, the upholding of a law does not avoid the possibility to present an APFR or the possibility to apply the exception of unconstitutionality (P.C. (4)). In those cases, competent judges (of other high courts or lower courts) may in any case ask the Court to clarify the scope of the sentence of constitutionality¹⁸², although this is not an obligation (D 2067/91).

3.6 The action of protection of fundamental rights (APFR)

This action was created by the P.C. of 1991 and is comparable to the concrete judicial review. The APFR is an institution with influence from the European model, especially Spain and Germany (López: 2004: 447), but also from the North American system of widespread control and discretionary revision of subjects

¹⁸¹ The Court introduced the notions of: (i) *ratio decidendi*, obligatory character of the motivation part of the sentence; (ii) *obiter dictum* (auxiliary criteria of interpretation), referring to parts of the sentence that do not belong to the main topic of the articles that was revised, or those parts that are not necessary to decide the conflict (C037/96); and (iii) *stare decisis* (obligatory precedent) used also to impose the obligatory character of the motivation (Lopez 2000:104-8).

¹⁸² The value of the case law in the Colombian legal system before the P.C. of 1991 is summarized under the term “probable legal doctrine” when three sentences of the Supreme Court of Justice were uniform. This is not a precedent and the “constitutional doctrine” had an interpretative value in cases of normative emptiness or ambiguity (L153/1887 quoted by López 2006:25). Lopez (2004; 2006a) presented the history of the constitutional precedent.

(García and Rodríguez 2001:423). In Latin America all countries have a mechanism of judicial protection of individual rights (mostly called “*amparo*” actions¹⁸³) having as common source the German and Spanish models (Navia and Rios 2005: 212-3). This action is not exclusive for Latin American countries; in fact, Constitutional Courts of the third world have been considered as more active in the protection of ESC rights, being the most representative countries Colombia, South Africa and India (López 2004:457).

In Colombia, the specificity of this action is that any person can ask any judge, in any moment, through a preferential and summary procedure and without the intervention of a lawyer, the immediate protection of her/his fundamental rights.¹⁸⁴ The P.C. establishes also that the lawmakers have to regulate the conditions in which it is possible to use this action against private persons that are carrying out a public service. The decision can be appealed and then, it may be revised by the Court. It is a subsidiary action because it can only be used when the plaintiff does not have any other legal way to protect his/her rights, or when he/she uses this action as a transitory mechanism to avoid an irremediable damage.¹⁸⁵

The APFR represents more than 70% of the total number of decisions of the Court. Table 3.3 shows the participation of the APFR case law in the total production of Constitutional Court case law in the analyzed period. Even if it is a concrete judicial review, its impact can be bigger than the one from abstract judicial review, taking into account the scope of precedent that the Constitutional Court pretends to give in the area of constitutional rights.

Table 3.3: Total number of sentences concerning the APFR

Year	2000	2001	2002	2003	2004	2005	2006	Total
Total number of sentences	1758	1346	1121	1233	1249	1318	1093	9118
Number of APFR rulings	1341	980	776	870	894	1045	846	6752
APFR as % of total rulings	77	73	69	72	72	79	77	74

Source: www.ramajudicial.gov.co

The case law of the Constitutional Court does obviously not reflect the total number of APFR presented in the country. During the years 1992-2003 it represented only 2.81 % of the total number of decisions

¹⁸³ The protection of fundamental rights was created in the Mexican legal system in 1857 (Fix 2001:286).

¹⁸⁴ The P.C. (86) states that this action can be used when a constitutional right was violated or menaced by the action or the omission of any public authority and when it cannot be avoided by other means.

¹⁸⁵ The APFR is not the only legal instrument foreseen by the P.C. Other procedures as ordinary actions, compliance actions, class actions, popular actions and compensation actions to protect a person’s dignity are established. The legislator can regulate other procedures to protect of person’s rights against deeds actions or omissions by the public authorities (P.C. (89)).

concerning this action, taken by lower courts (table 3.4).¹⁸⁶ The total number of rulings may even be an underestimation because it seems that the obligation to send all the APFR to the Constitutional Court is not strictly followed by lower courts (Giugale et al., 2003:900).¹⁸⁷ As mentioned before, the law should regulate the procedure to select those sentences that are going to be revised. Decree 2591/91, which has legal status, expressly conferred a discretionary competence to the Court to decide which decisions it will revise.

Table 3.4: Total number of APFR and sentences revised by the Court

Years	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	Total
Total # of APFR	10732	20181	26715	2995	31248	33663	38248	90248	131765	133273	143887	149454	546023
APFR revised	590	450	400	542	903	1073	1373	1413	10997	2094	1161	1119	19835
%	5.50	2.23	1.50	1.81	2.89	3.19	3.59	1.57	8.35	1.57	0.80	0.74	2.81

Source: www.constitucional.gov.co

Although Law 270/96 (SLJA) established that the APFR is a sort of concrete review and, therefore, it only has *inter partes* effects, the Court adopts more and more features of common law case law to give its sentences the character of precedent. Moreover, constitutional case law on Law 270/96 ruled that the *inter partes* effect is with respect of the concrete resolution of the case, but the reasoning to take such decision has the character of *ratio decidendi*; otherwise it could violate the principle of equality (López 2000:38).¹⁸⁸

The P.C. (152-3) establishes a specific procedure to approve statutory laws related to fundamental rights and their protection. This means that the scope of constitutional rights has to be regulated by law; but until now no regulation has been enacted and the Constitutional Court uses this absence to argue that some rulings have a general character because of the absence of law (cf. SU¹⁸⁹ 082/95 quoted by López 2000:34). However, this interpretation is not respected unanimously in the judicial branch. Several judges reject this “constitutional doctrine”, because the P.C. (228 and 230) establishes that legal limits should be observed by the administration of justice, otherwise they can be sanctioned when failure exists in the application of the law, and that they are bound only by the rule of law. “Fairness, jurisprudence, the general principles of law and doctrine are auxiliary criteria of judicial proceedings” (López 2000:40-9).

¹⁸⁶ In the period 1992-2001 the APFR grew at a rate of 130 percent (Cepeda 2004b).

¹⁸⁷ In principle, all decisions have to be notified to the Constitutional Court for revision (P.C. (241)).

¹⁸⁸ Cf. T418/96 which nullified a second instance sentence because it did not respect the precedent in health matters. The basis of this system of precedents based on the equality principle was adopted from the case law of the Spanish Constitutional Tribunal (Lopez 2000:28).

¹⁸⁹ SU sentences (‘sentences of unification’) are those which change precedents and they have to be decided by plenary session (D2591/91 (34)) quoted by López (2000:35).

In the period 1992-96, the Court conceded, as a percentage of total demands, more APFR than any other judicial instance (García and Rodríguez 2001:432-6). This result is explained first, by the selection of the cases. The Court has been using its discretionary competence choosing cases in which “ordinary judges do not perceive a violation of a fundamental right” and has been using the revision to define and motivate new circumstances in which fundamental rights are violated. Second, there are many recurrent conflicts, because a large number of actions have the same causes.¹⁹⁰ This situation contrasts with other courts’ opinions, as e.g. those of the Council of State where 92.5% of these actions were denied because of procedural reasons or the Supreme Court of Justice that denied 93.7% of the cases, of which 56% were denied due to procedural reasons (García and Rodríguez 2001:445). This study concluded, first, that judicial decisions are not effective to change the future conduct of the State, given that 80 % of the APFR is presented against its institutions (García and Rodríguez 2001:429). Second, that the absence of procedural unification criteria has pushed the over-utilization of this action, which ignores its constitutional goals. But this large judicial liberty without the obligation to respect precedents is used in the name of the effectiveness of fundamental rights (García and Rodríguez 2001:453-4).

3.7 Economic, Social and Cultural (ESC) rights

The conflict between the judiciary and economic regulators in Colombia mostly relates to the enforcement of the ESC rights under the implementation of economic adjustment programs. The present research is particularly focused on “ESC rights” referring to provision rights that seek the coverage of basic needs of the citizens. Usually they are identified by their economic content and their possibility to be provided by the market, although their provision implies a positive action from the State. There is a particular focus on ESC rights involving public resources, and those directly related with the structural programs of the IMF arrangements.¹⁹¹ The conceptual framework of ESC rights and the present situation at the international level are first presented to contextualize the Colombian case.

3.7.1 Conceptual framework

Within the broad category of human or fundamental rights, ESC rights have been considered as a sub-category regulated by the Universal Declaration of Human Rights (UDHR (22-7)). More specifically,

¹⁹⁰ Courts congestion due to the over-utilization of the APFR has only recently been addressed by the State. A study was realized on the causes that generate most of the APFR in health issues (Defensoría del Pueblo, 2004).

¹⁹¹ These rights refer mainly to social security, public health, housing and labor protection.

economic rights were defined as guarantees and claims that allow individuals to participate in the economic environment to gain advantage from productive activities. Social rights relate to aspects of employment (the protection of workers) and the general conditions of living. Finally, cultural rights are linked to the cultural identity and participation in cultural life (Coomans 1995:3-4).

Because of the clear linkage between legal issues, on the one hand, and the scarcity of resources on the other, a pluralistic inter-disciplinary approach was chosen to tackle the issues at stake. A number of building blocks of such a conceptual framework were distinguished: A first building block refers to the kind of goods and services implied in the realization of ESC rights. Some authors classify them as public goods¹⁹² but others consider them as private goods. The most balanced view is probably that merit goods are implied because, although they can be obtained in the market, the intervention of the State is needed to guarantee the rights for the whole population (Gonzalez 2000:43-6). Citizens are therefore required to be responsible and make an effort to get the goods and services, whereas the State is required to correct the market inequities to guarantee the provision for all.¹⁹³ From the angle of public policies, the satisfaction of these rights depends on the availability of resources and, hence, choices must be made due to the impossibility of covering all the needs of the whole population. As a result, there is a majoritarian opinion that the duty of satisfaction is progressive and not immediate (Castaño, 2006:3).

A second building block refers to the determination of the public power that has the most adequate capacities to solve the issues on the provision of ESC rights. A useful distinction was put forward between *macro-questions*, related to the society and the distribution of resources (welfare of the society) on the one hand, and *individual questions* related more to ethical questions, on the other (Gilain, 2002:5). Other perspectives have arisen to tackle the conflict between an individual right and a collective right (collective welfare) by avoiding the qualification of some ESC rights as absolute rights because the position of the poorest people would be deteriorated and therefore well organized groups would keep a bigger part of the budget (Castaño, 2006:18). The constitutionalization of ESC rights made the conflict visible between different powers, and led to the discussion about the capacities of the judiciary to understand the resource allocation and distribution as developed by the regulators (i.e. legislators and government) (Michelman, 2003:15). The central point concerns the enforceability of ESC rights, and the unequal opportunities

¹⁹² Gonzalez (2000:44), referring to the right to health, quoted the definition of Samuelson (1969): public good is the one that does not allow exclusion or rivalry and all the people can get the good without obstacles.

¹⁹³ For an application of this idea to health services and health insurance, see e.g. Gilain (1995).

(abilities and means) for all citizens to pursue them. The poorest people are normally not the ones who use the judiciary to obtain a social service, on the contrary, those in a better position often benefit of these legal means.¹⁹⁴ A side-effect is that the judiciary should decide between usurpation and then, it may commit errors in resource allocation, or abdication, even though, it may leave the regulators the “privilege of indefinite postponement of a declared constitutional right” (Michelman, 2003:16). The option of usurpation is rejected by some positions because the judiciary is not the best way to correct the redistribution of scarce resources, due to fact that not all the cases are studied; they only know those presented to judges¹⁹⁵ (Posner 1998; Rubin 1999; Bouckaert 2002).

A third building block relates to the deontological vs. consequentialist perspectives on ESC rights. From the deontological perspective, the consequences of some regulations should not necessarily be taken into account whereas from the consequentialist perspective, the consequences are as important as the nature of the institution. The first approach relates to the independent theory of rights which does not discuss the priority of rights. The possibility of weighting the relevance of different rights and the situations needed to satisfy them, are not part of the analysis. Within the deontological perspective, there are positivist and neo-constitutionalist visions; the latter ones promote a judicial activism seeking the compensation and deepening of the realization guaranteed by the legislator, whereas the former ones promote the respect for the legislative competences in this matter (García A. 2007:21). The second perspective analyses the provision of goods (and services) from an economic point of view, being the more important approaches Law and Economics (Lamprea 2006:84) and Public Choice. A concrete “normative” public choice approach analyzed the topic of rules affecting constitutional rights and its voting process in the case of developing countries, particularly in Latin America. Some of the theoretical guidelines were the following: The protection is high when the majority rule applies to pass legislation that may harm citizens, although the greatest protection is the establishment of the unanimity rule, because the minority has a veto right. The transaction costs drop if those issues are regulated as unconditional rights and hence, some criteria to define rights were suggested: a) rights must secure precise actions and non-actions; b) rights must be defined only when a risk exists that “a future subset of the community” will try to obstruct specific actions; c) rights must be defined to guard specific actions where the benefit for the actionist is supposed to be much higher vis-à-vis the potential costs “imposed upon second parties”. Those criteria do not mean that the

¹⁹⁴ Literature and studies concerning justice and the poor are abundant. For the case of Colombia, see Buscaglia and Stephan (2005) and for Latin America see Gargarella (2002).

¹⁹⁵ This usurpation of competences may be seen as a discretionary use of judicial interpretation (Voigt 2005).

creation of a unique group of rights worldwide is possible, because they have a cultural component (Mueller 1999:121). Concerning ESC rights, provided that not all citizens can get all goods and services to have an acceptable level of life, the state should provide those minimum guarantees. “A minimum guaranteed income, financed out of a general tax, has the characteristics of a constitutional right”. Economic constitutional rights allow eliminating “compulsory state–provided” redistribution, because citizens are allowed to contribute to private insurance programs. To avoid the participation of interest groups, tax and expenditure bills must be approved by large legislative majorities. The study recommended the inclusion of ESC in the constitutions when “the welfare increase of the subsidy recipient (is) very large relative to the welfare loss of the taxpayer”. In rich countries “people needing subsidies is small as is the burden on the taxpayers; therefore, the list of entitlements may increase; in contrast, in poor countries [...] each new entitlement increases the burden on the small portion of taxpayers that support this burden”. As a result, a short list of rights is optimal and in any case it should depend on the “income level and the degree of empathy its citizens feel for one another” (Mueller 1999:122-3). This issue of resource allocation to provide a universal coverage of constitutional rights has been gaining a central place in the debates but it is very complex in developing countries, particularly in those where the rights discourse is politically important (Marmor, 2004:14).

3.7.2 International evolution of the enforceability of ESC rights.

The international context of ESC rights has undergone a significant evolution. For the sake of conciseness, reference will only be made to some essential milestones. In 1985, the UN Committee on Economic Social and Cultural Rights was created to supervise the observance of ESC rights by states party to the International Covenant on Economic, Social and Cultural Rights¹⁹⁶ (ICESCR) (Coomans, 1995:6). In 1986, in Maastricht, the nature and scope of the duties of the states parties to the ICESCR were discussed. “The Limburg Principles on the implementation of the ICESCR”¹⁹⁷ were adopted. The most relevant principles for the purpose of this thesis were: i) the full realization of those rights may be achieved only gradually; ii) only some rights are immediately enforceable through the courts, but in any case, the minimum subsistence level for every individual principle should be guaranteed; and iii) the States are free to choose the ways to realize ESC rights (Coomans, 1995:8-9).

¹⁹⁶ The Covenant was approved by Colombia through Law 74/68.

¹⁹⁷ They analyzed the nature and scope of ESC rights and the corresponding duties of countries having accepted the ICESCR. The government of the Netherlands published them as an official document (UN Doc. E/CN.4/1987/17, Annex, quoted by Dankwa, Flinterman and Leckie 1998:13).

The idea of developing a core content for each right was proposed to set a minimum obligation and therefore, to better evaluate the accomplishment of the States' duties by the Committee of ESC Rights (Coomans, 1995:11). Some Scandinavian authors proposed this "minimum threshold approach" to analyze the accomplishment of ESC rights by each country (Andreassen et al., quoted by Coomans, 1995:12), to identify the share of the population living below the minimum subsistence level (threshold), and to put in action specific policies to realize ESC rights. However, the main obstacles to realize those rights were recognized as, extreme poverty and structural adjustment programs (Coomans, 1995:14).

In 1990, a General Comment (3) of the Committee recognized that the law is one important means to develop the realization of ESC rights but that it is not the only one; the States should explain not only the measures taken but why they are the most appropriate. Of particular importance are the legislative measures because they allow its justiciability through courts. As a result, besides legislative measures the enforceability through national courts of some parts of the Covenant was recognized (Coomans, 1995:17). This General Comment referred expressly to the concrete obligations of the states vis-à-vis ESC rights: the respect, protection and progressive fulfillment of these rights. Any "deliberated retrogressive measures" against ESC rights were particularly regulated: they had to be specifically analyzed; they had to be fully justified by reference to the whole content of the Covenant and they had to demonstrate that it was a priority to use the maximum available resources to satisfy the minimum content of the duties. Budgetary restrictions were not supposed to eliminate the obligation of the state, even in cases of adjustment where particular protection had to be provided to most vulnerable groups (General Comment 3/1990).

The Protocol of San Salvador, adopted by the Organization of American States (OAS) in 1988, adopted all ESC rights presented in the ICESCR. The Inter-American Commission recognized individual claims "when a violation occurred because of direct action by government (...) and changing the situations would depend on it" (Inter-American Commission 1984-5; quoted by Coomans, 1995:34).¹⁹⁸

In 1993, the non-compliance with the duties of the States was defined as a fault. However, given the economic crisis in some countries, the obligations derived from international instruments were rather considered as guidelines for policy making (ICESCR (4) quoted by Coomans 1995:22-3).

¹⁹⁸ Colombia ratified the treaty by Law 319/96, analyzed by the Constitutional Court in C251/97.

In 1997, the “Maastricht Guidelines on Violations of Economic, Social and Cultural Rights”¹⁹⁹ provided a relevant insight concerning the justiciability of ESC rights. The doctrine of the “Multi-Layered Obligations” was suggested by several authors (Toebes 1999; Puta Chekwe and Flood 2001; Hunt 1993; Eide 1989; quoted by Figueroa 2005: 7-8) who based it on the classification of state obligations developed by the Maastricht Guidelines (1997): The duties to respect, protect and fulfill. The first two levels were supposed to be enforceable before courts, but as far as the duty to fulfill was concerned, its vague character impeded the defense of its immediate justiciability. However, the States were expected to adopt concrete measures to obtain a progressive fulfillment, as the ICESCR ordered (Figueroa, 2005: 7-8). The guidelines defined a series of violations that can be alleged but the fulfillment is still the challenge. These guidelines, together with General Comment 9 regulated the duties of member states (OUNHCHR 2005: 63).

General Comment 9/1998 referred to the domestic application of the Covenant. This Comment highlighted that the Convention of Vienna (27) obliges the states to reform their legal order to comply with the obligations of international treaties as in the ICESCR. In addition, it stated that despite the lack of judicial remedies in case of violations of ESC rights as in the International Covenant on Civil and Political Rights (ICCPR), the judicial way cannot be excluded to seek their implementation. The Comment recognized the discretion of the states to comply with the ICESCR but recommended its inclusion as national law to allow its direct invocation in national courts. Judicial remedies were recognized as a subsidiary way to implement ESC rights, when administrative steps were not enough or when issues of discrimination were involved.

In the decade of the nineties, the ESC rights enforcement was described as “a widespread and massive denial of the enjoyment of ESC rights in many countries” (Coomans, 1995:38). Their lack of recognition as fundamental rights was supposed to be the responsible for their non-enforcement, because the adverse consequences of economic trends were accepted as excuse for non-compliance. While the violations of civil and political rights have been lively reported, situations of poverty (i.e. hunger, disease, unemployment and illiteracy) have been neglected and not accepted as serious failures to the realization of ESC rights (Coomans, 1995:38). Arguments against the enforceability of ESC rights through the judiciary were justified by the vagueness of the rules of the ICESCR which impede their enforceability at the national level. They

¹⁹⁹ They were defined by the same entities that defined the Limburg Principles seeking for a further realization of the Covenant. The focus was on the violation of ESC rights and therefore on the creation of skills to monitor the duties of the states (Dankwa, Flinterman and Leckie 1998:14-5).

were considered in some cases as group rights and, therefore, the individual complaint procedure was unsuitable. A proposal was the design of a procedure giving both individuals and groups a right of complaint, but only if the case had a scope beyond the interest of the individual solicitor²⁰⁰ (Coomans, 1995:39-40). ESC rights were thus “approached by means of a process of weighing up and choosing between different policy considerations and alternatives”²⁰¹ (Coomans, 1995:24).

Concerning the monitoring of the accomplishment of international duties related to ESC rights, many issues arise because these obligations are of conduct and results. Therefore, the construction of “indicators and national-level benchmarks” was recommended, complemented by the establishment of targets and goals for each right. They should take into consideration the minimum core content of each ESC right which defines the obligation of the State independently of its level of economic development (OUNHCHR 2005: 59-65). These obligations may be distinguished on the basis of whether they have immediate effect or whether they are defined as a “progressive realization” of these rights. The former duties are “the duty to take steps or adopt measures directed towards the full realization of the rights contained in the ICESCR, and the prohibition of discrimination” and they are justiciable (ICJ 2008:25-7). The latter ones leave more discretionary competences to the countries to decide the budgetary allocations for the compliance with these duties. Especially the existence of this category has led to the development of “review standards” designed to monitor the compliance with these duties by “indicators and benchmarks to assess the improvement, stability or deterioration of the enjoyment of rights or the goals enshrined in the ICESCR” (ICJ 2008:28-9). The Limburg Principles also advised the use of indicators to assess the progress in the implementation of the provisions of the ICESCR (Principle 89). However, the lack of reliable statistics, universally recognized indicators and accurate figures, made that the evaluations have been frequently based on estimates. Moreover, the statistical material may be subjective (produced by national authorities), showing general tendencies instead of individual claims (Coomans, 1995:97). Judicial adjudication is seen as an inconvenient way to evaluate the “progressive realization” of ESC rights precisely because of the “difficulties regarding the reliability of both empirical indicators and data, (and) the difficulty of asserting causal links between State action or inaction and the alleged regression” (ICJ 2008:29). However, the

²⁰⁰ These complaints had to fulfill some criteria: a “significant number of people “had to be affected, they had to refer to a systematic action or lack of action of the State and they had to involve a pattern of alleged violations that transcends merely individual situations (UN Doc. A/ CONF.157/P.C./62/Add 5 Annex 2 quoted by Coomans 1995:39-40).

²⁰¹ Council of Europe Document CE /CMDH (93) 7-22 January 1993 Quoted by Coomans 1995:23-4.

regression in the protection of ESC rights has been actively challenged in tribunals in many countries (ICJ 2008:29-33).

The use of development indicators to measure the compliance with the enforcement of ESC rights is not generally accepted. Although they serve to verify whether a country has progressed or not in specific sectors, the argument against its use is that the material progress does not necessarily imply an improvement of the quality of life, which better reflects the level of compliance with ESC rights (Sandoval 2005:465-6). These indicators are not seen as very efficient in terms of enforceability because the perspective of rights enjoyment is shown but “the perspective of the duty bearer” is omitted²⁰² (Sen 2001, quoted by Lawson-Remer, Fukuda-Parr and Randolph 2009:4). The measurement of ESC rights enforcement should reflect the human condition and the effort realized by the country to accomplish its duties (Lawson-Remer, Fukuda-Parr and Randolph 2009:4). The design of methods to evaluate the compliance of ESC rights by the states based on the General Comments²⁰³ was proposed taking into account some relevant elements as the availability, the access to information and means, and the adaptability of each right. The typology of the violations of ESC rights, presented by the Maastricht Guidelines, was suggested as a good complement (Sandoval 2005:470-1).

An index of fulfillment of socio-economic rights²⁰⁴ was designed, seeking to include both the rights and duties, and the progressive commitment to realize rights with the “maximum available resources” (Lawson-Remer, Fukuda-Parr and Randolph 2009:2). The basis of the index were the socio-economic statistics and the resources available in the country, which would determine how the country is complying with the duty to fulfill the “progressive realization” of ESC rights. The latter means that absolute country scores are not directly compared, but that they are first transformed into relative scores (i.e. expressed as a percentage of the empirical frontier that could be reasonably achieved taking the *per capita* income level of the country into account) (Lawson-Remer, Fukuda-Parr and Randolph 2009:4).

²⁰² Another study presented a difference between civil, political and cultural rights, on the one hand, and socio-economic rights, on the other, in terms of measurement, because the first ones are difficult to quantify and therefore, their indicators are based on “subjective opinion of ‘experts’” and their legitimacy is easily contested (Lawson-Remer, Fukuda-Parr and Randolph 2009).

²⁰³ They are enacted by the Committee on ESC rights of the UN who interprets the provisions of the Covenant.

²⁰⁴ The basic ESC rights are the right to food, to education, to healthcare, to housing, to decent work and to social security. The study expressed the difficulty of measurement of informality in labor markets and excluded the right to social security because of the impossibility to find international data sets (Lawson-Remer, Fukuda-Parr and Randolph 2009:3, 5 and 7).

Since 2000 the creation of adjudicative mechanisms at the international level to realize ESC rights, and more generally the Millennium Development Goals, has been a very controversial issue. Some critics argue that they do not depend only on legal skills because political and economic reasons are evenly important. Compulsory orders from the international level may not be more effective than international aid, provided that the lack of resources is the main argument alleged against the accomplishment of the ICESCR. This position recognizes ESC rights and their binding character for the countries that ratified the ICESCR as well as the utility of General Comments to force the compliance of the ICESCR. Notwithstanding, justiciability is not seen as an essential character of a right. Even more, the scope of the duties contained in the ICESCR was not supposed to be defined by the judiciary, because the different nature of rights justified the signature of two Covenants: one for ESC rights and one for civil and political rights. Taking into account that these differences have not changed, the mechanisms of enforcement should be different (Dennis and Stewart 2004: 514-5). These arguments are reinforced by the fact that this differentiation introduced by the two Covenants was also reproduced in the regional systems of protection of human rights (ICJ 2008:4). The objection of the justiciability²⁰⁵ of ESC rights refers also to the vagueness in the contents of ESC rights, to the lack of capacity and legal competences of the judiciary to adjudicate on issues of social policies, and to procedural inconveniences in the judicial process (ICJ 2008:3). The defense of the use of courts to realize ESC rights respect the general competences of the legislative and the executive; but they seek to avoid the lack of skills of the victims of violations of ESC rights to obtain remedies and reparations, and the lack of accountability and determination of the state to implement these rights (ICJ 2008:3).

Currently, a general tendency seems to be that new Constitutions adopted affirmative duties on the part of the State to address ESC rights (Kinney and Clark, 2004:288). The defense of the justiciability of ESC rights is centered on the enforcement of the obligations of the ICESCR. Many countries have been using “international legal standards” in the interpretation of national rules or even more, the judiciary, has been applying it directly (ICJ 2008:18). As a result, a common trend in judicial adjudication seems to focus not only on the specific scope of an obligation but on the application of “legal standards, such as ‘reasonableness, ‘proportionality’, adequacy’, ‘appropriateness’ or ‘progression’” (ICJ 2008:21). Concretely, judicial review of goals and means of the state became an issue of analysis to verify (i) whether these purposes justify some specific measures, (ii) whether the constitution or international treaties on human

²⁰⁵ Justiciability is defined as “the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur” (ICJ 2008:6).

rights accept these goals of the state, and, (iii) whether other constitutional goals were considered when concrete issues are regulated (ICJ 2008:34).

The core content of a right understood as the “definition of the absolute minimum needed, without which the right would be unrecognizable or meaningless” (ICJ 2008:39) is considered as the corollary of human dignity, commonly denominated in the judicial language as “the vital minimum or ‘survival kit’”. The German Constitutional Court has strongly influenced other countries on this issue, including Switzerland, Brazil, Argentina (ICJ 2008:23-5), Spain and Colombia.

Duties to fulfill, understood as the provision of services and the enactment of rules necessary to implement these rights, are also analyzed under the parameters of “reasonableness, adequacy, equality and non-discrimination”. Cases analyzed by courts refer mostly to omissions of the state. They were summarized as follows: “(i) total or partial omission; (ii) failure to meet substantive standards regarding the quality of services; (iii) failure to meet procedural standards for planning, implementing or monitoring services; insufficient allocation of resources; failure to implement statutory obligations (iv) failure to regulate and monitor private parties when public services are outsourced; or (v) failure to provide services to eligible individuals” (ICJ 2008:49). This way of adjudication on ESC rights issues accepts that judicial adjudication has a double character, judicial and political, because it applies rules or principles to concrete cases but it also takes discretionary decisions when it chooses a specific way of interpretation (ICJ 2008:74). The justification of the competences of the judiciary to deal with ESC rights cases is that it follows the same logic as when it decides cases of civil and political rights: they have to respect the constitutional supremacy (ICJ 2008:80). However, the respect of discretionary competences of the legislative and the executive by the judiciary is recognized. The core issue is the omission of these powers in the fulfillment of ESC rights (ICJ 2008:81). The distinction between civil and political rights and ESC rights vis-à-vis their enforcement before courts does not depend on the type of right but of the degree of complexity, because “cases involving collective or massive impact, structural reform, absolute omissions, general policies not in line with a legal duty, defective organization of a service, and other complex issues, may require a more careful approach by the judiciary”. The interaction among powers is therefore necessary to solve the situation by balancing the different issues at stake (ICJ 2008:85). Procedural ways to protect rights violation are thus being implemented worldwide; some examples are the class action, the *amparo* actions and preliminary actions. A complementary measure is the flexibilization of procedures to ease the expedite resolution of

violations of rights. Particular advancements are recognized in Latin America (Argentina, Brazil, Colombia and Costa Rica) but also in countries like India and South Africa (ICJ 2008:95-6). The use of comparative experiences and regional case law to encourage judicial activism in the defense of ESC rights is strongly defended (ICJ 2008:103-5).

3.7.3 ESC rights and the IMF

The conflict between economic liberalization and the principles of the Legal Social State is not only present in constitutional regulations; also in the multilateral regulatory framework several discussions arose. While the IMF is regulating the globalization of the economy, the United Nations are defending development as a right and are warning that the IMF structural adjustments should not violate this right to development (Decision of the Economic and Social Council 1998/249; Burgos 1998, 2000; De Feyter 2002). More particularly, the relation between ESC rights and the activities of the IMF has been analyzed, provided that most of the countries that signed the ICESCR are also members of the IMF. This Covenant was linked to the right to development in 1993 at the World Conference on Human Rights in Vienna. It was stated as follows: “every human person and all peoples are entitled to participate in and contribute to, and enjoy economic, social, cultural and political development” (Resolution 41/128 (1) of 1986, quoted by Gianviti, 2005:2). Concerning the applicability of the Covenant to the IMF, countries that receive technical or financial assistance have the duty to ensure that the adjustment program is compatible with duties derived from the ICESCR. In addition, the IMF cannot limit the capacity of the State to comply with the Covenant.²⁰⁶

From a legal point of view, it was traditionally argued that the main competence of the IMF, being a monetary agency and not a development agency, concerns the macroeconomic balances and not individual sectors (as in the case of development banks²⁰⁷), and that IMF resources are not conceived for project financing. Moreover, the Covenant is a treaty among states that does not apply to the IMF because it does not have the status of general international law (Gianviti, 2005:42-3; See also De Feyter 2002:11). Notwithstanding, the Comprehensive Development Framework (CDF) and Poverty Reduction Strategies

²⁰⁶ The Committee’s concluding Observations on Morocco. E/C.//Add.55, Dec. /00 § 38 quoted by Gianviti (2005:20). See also De Feyter (2002:13).

²⁰⁷ The IADB established first the “Mechanism of Independent Researchers” by which persons negatively affected by an operation of the bank may complain when the bank did not comply with its operative policies or its regulations when it designs, negotiates, or executes an operation of financing. This mechanism was reformed in 2005 by the “Mechanism of Consultation and Revision of Compliance” proposed to be used as the way to ask the protection of the ESC rights by the IADB when it realizes its operations in developing countries. This proposal did not present concrete results because the mechanism depends on the Bank and therefore, the duty of compliance of international rules on human rights has not been adopted (Delaplace 2005: 222-31).

endorsed by the IFIs in the eighties, even if they did not change the legal nature of the IMF as the responsible for macroeconomic stabilization and surveillance, are more and more concerned with the impact of the IMF programs on the development objectives, which are mainly of the domain of the World Bank (De Feyter 2002:12).

However, in discussions on economic development, the conflict between economic liberalization and the respect for human rights is a central topic, as well as in the design of structural adjustments programs. Particularly, ESC rights suffer restrictions during the implementation of structural adjustments with the expectation of being reestablished in the long term (Abouharb and Cingranelli 2006). The establishment of an adequate regulatory framework that contributes to the realization of social policies with equity is seen as necessary and it should define priorities among ESC rights.²⁰⁸ Structural Adjustment Arrangements normally imply budgetary adjustments which limit the possibilities to enlarge the coverage of social services.

In 2003 a group of experts presented the “Tilburg Guideline Principles” which sought to define the human rights duties of International Financial Institutions (IFI), mainly emphasizing that macroeconomic and financial issues cannot be isolated from economic, structural and human aspects of development. This means that human rights issues should be integrated in the activities of IFIs. The legal sources to establish these duties were the Articles of the Agreement of IMF which oblige to respect domestic social and political governance of the countries, including their commitments with the international human rights law. Therefore, the countries cannot accept arrangements that obstruct the compliance with international human rights law. Another source of such legal obligations of the IFIs is related to the current definition of development, which include the respect for human rights. The IMF was required to include a clause rejecting any financial agreement that violates international human rights law.²⁰⁹ These new rules sought to promote “open and transparent” decision making of IFI. The potential impact of their activities on human rights issues has to be evaluated, particularly concerning gender, race, religion, age and poverty. Concrete tools to obtain their compliance were proposed: (i) monitoring, and (ii) additional resources for staff training on international human rights law. The IMF was also required to reform the accountability mechanisms to

²⁰⁸ Horizontal effect of constitutional ESC rights is also involved because some rules or case law may enlarge their scope. Private agents may be obliged to provide a social service even if they do not have legal or contractual duties. Hence, the freedom of enterprise can sometimes be subordinated to the realization of ESC rights by rules or by Courts.

²⁰⁹ The World Bank was required to include a clause in all project financing or loan arrangements prohibiting projects that perturb international human rights law (Tilburg Guidelines Principles 2003; De Feyter 2002:10).

allow a “settlement of complaints” presented by affected groups of persons by IMF programs and policies (Tilburg Guideline Principles 2003).

IFI's are now compelled to comply with human rights mainly because of their inclusion in the definition of development (Rittich 2006:225) and because “elements of human rights law have obtained the status of costume and of General Principles of Law” (De Feyter 2002:8). Human rights became a goal of development but also their respect is more and more linked with “good economic outcomes”, due to the protection of the civil society, the attraction of investment and the favorability of growth (Rittich 2006:225). In the particular case of International Labor Standards, both the World Bank and the IMF explicitly recognize their rules and accept as valid the scope put forward by the ILO. However, the protection of labor rights is also subordinated to the concept of flexibility to ease the development of markets (Rittich 2006:232-3). Despite this progress, IFI have resisted to the absolute compliance with the commitments of International Human Rights Law; they do not completely share the “rights-based approach to development”. They even defend the right to trade, as a basic human right and therefore the inclusion of rights in the arrangements with IFIs are not absolutely accepted (Rittich 2006:245). In practice, IFIs are accused of acting as an arbiter in the application and prioritization of rights and in any case, they privilege efficiency (Rittich 2006:247-8).

A study on the relation between the IMF and the World Bank structural arrangements, on the one hand, and the respect of fundamental rights, on the other, found that developing countries show an inversely proportional relation between length of structural arrangements and respect for fundamental rights by governments (Abouharb and Cingranelli 2007:81). The question then is whether the bad score of these governments was due to the result of the difficult economic conditions that motivated the request of the structural adjustment, or whether it was a direct consequence of the Structural Adjustment Arrangements (Abouharb and Cingranelli 2007:85). Adjustment programs suppose that the longer the periods of time a country is liberalizing its economy, the greater are the benefits obtained by these arrangements (Abouharb and Cingranelli 2007: 94). As a result, IFI criteria to select the countries that would enter in Structural Adjustment Arrangements were highly relevant for the conclusions of the analysis (Abouharb and Cingranelli 2007:106). Data analysis basically found that: (i) countries have higher possibility to enter in these arrangements when they are indebted, when international trade markets are reduced, when their level of respect for physical integrity rights is higher, and when sovereignty costs are lower (Abouharb and

Cingranelli 2007:125-7). (ii) Democratic countries with larger populations have higher possibilities to conclude a Structural Adjustment Arrangement, which was qualified as a political bias because of their relevance at the international level (Abouharb and Cingranelli 2007:130). Despite these observations, the measurement was difficult because the countries did not implement automatically structural adjustments²¹⁰, and some studies showed that even countries that received the highest quantities of resources did not liberalize completely their economies (Erias 2003 quoted by Abouharb and Cingranelli 2007:94).

In 2000, the OECD and the United Nations published the document “A Better World for All” that proposed poverty reduction by 2015, known as the “Millennium Development goals” (Abouharb and Cingranelli 2007: 135). This document is relevant because adjustment programs have been linked with poverty increase; the mentioned study concluded that in this respect, after having controlled for all the issues of selection, the conditionality of those arrangements worsens government levels of respect for ESC rights in developing countries (Abouharb and Cingranelli 2007:136-7). In particular, duties of fulfillment of ESC rights were negatively affected by the structural adjustment programs (Abouharb and Cingranelli 2007:138). They recommend taking these results into consideration for designing the means to reach the Millennium Development Goals. The economic liberalization promoted by both the IMF and the World Bank seems to be producing results opposite to their intentions, i.e. poverty reduction or even elimination (Abouharb and Cingranelli 2007:149). Defenders of structural adjustment criticized this analysis by arguing that not all the countries implemented the policies of IFI, that the situation of those countries was bad enough before entering into the arrangements and that the governments are the responsible for the implementation of policies affecting the poor. Paradoxically, the concept of “good governance” promoted by the World Bank sought to fight against “corruption, subsidies and kickbacks” but also the promotion of human rights by governments (Abouharb and Cingranelli 2006:4).

3.7.4 ESC rights in Colombia.

ESC rights in Colombia have a constitutional status. Chapter 2 of the II title of the P.C. regulates a vast list of rights summarized as follows: (i) the family, women, children, youth adolescent, elderly and disable people should be protected. (42-7); (ii) the social security is a mandatory public service and the right to

²¹⁰ Relevant issues were how to measure accomplishment and how to define when a structural adjustment program was implemented. In the most complete study, a program was defined as completed if a country implemented 81% of program conditions (Killick 1996 quoted by Abouharb and Cingranelli 2007: 95).

social security is irrevocable and must be guaranteed to all the population (48); (iii) public health and environmental protection are public services for which the state is responsible (49-50); other protected rights include (iv) the right to housing (51); (v) the right to leisure (52); (vi) labor protection (53 -7); (vii) the right to private property (58), its limits (59), the promotion of the access to property (60), the protection of intellectual property (61), the regulation of donations (62), the property in public use (63) and, the promotion of the gradual access of agricultural workers to land property (64 -6); (viii) the right to education as a public service (67-9); (ix) cultural rights (70 -2); (x) the freedom of press (73); (xi) the right to access to public documents (74); (xii) the regulation of the electromagnetic spectrum (76) and the TV (77).

Constitutional case law transformed the nature and scope of ESC rights involving the provision of goods or services. The main issue has been the definition of whether they are fundamental rights and, as a consequence, the State should guarantee them in an immediate way, or whether they are rather to be seen as goals of the State and their obligations are of progressive compliance. The parameters of international law, which identified which duties related with ESC rights are of immediate enforcement and which ones are of progressive compliance, have not been clearly defined by the constitutional case law. Apart from the constitutional and budgetary discussions (related to the distribution of competences to delineate the scope of those rights, and the difficulty, from the perspective of budgetary programming, to comply with judicial orders immediately), other difficulties arise from the perspective of the citizens, because they are forced to compete to obtain certain social services.

The defense of ESC rights has been a relevant matter of constitutional doctrine in many countries. Some studies showed that communist and developing countries have emphasized the realization of ESC rights, while developed countries have given more weight to the first generation of rights (Coomans 1995:5).²¹¹ Colombia is not the exception and ESC rights have been qualified as the corner stone of the legal reasoning of the Constitutional Court (Cepeda 2004b:617). Although traditionally their protection is reached by their inclusion as constitutional rights whose empowerment has to be regulated by law, in some cases, the judiciary has been trying to give a more prominent role to its case law related to the scope of those

²¹¹ In Spain the protection of ESC rights is not covered by the “*amparo*” action and therefore they can only be alleged in the ordinary jurisdiction. The possibility of being protected by the “*amparo*” action through the connection with fundamental rights was proposed a few times in Germany but in Spain there has not been case law development in this way, because they are considered a competence of the legislative (Prieto 2004:68 -70). The main reasons found in the Spanish constitutional case law to avoid the treatment of ESC rights as an enforceable right were: the impossibility of using the *amparo* action; the recognition of the discretionary competence of the legislator (“the liberty of configuration”); the need to establish an organization, to allocate resources and to avoid potential conflict with other principles or constitutional rights (Prieto 1995: 51).

constitutional rights. In fact, constitutional interpretation extended the use of the APFR, foreseen only to protect the rights listed in article 86¹⁸⁴, to other included in chapter 2 (ESC rights) of the P.C. The circumstances in which the Court allows this use were summarized as follows: “(i) ESC rights that become fundamental “by connection”; (ii) ESC rights that are fundamental in and of themselves, such as the fundamental rights of children, the right to adequate nutrition and to basic elementary education; and (iii) the right to minimum conditions of dignified subsistence or ‘vital minimum’”²¹² (Cepeda 2004b:618).

For the Court, if the State does not allocate fiscal resources by law to supply basic needs, the judicial power can intervene.²¹³ This was judged as the Court seeking to protect ESC rights without taking into consideration the economic effects of their rulings. Moreover, the Court affirms that the protection of the ESC rights is one of its main functions in view of reaching the objectives of the Legal Social State.²¹⁴ This kind of judicial activism is justified by the Court because the costs of upholding these rights are thereby not seen as a valid argument to ignore the clear constitutional mandate to the State to protect all constitutional rights. Moreover, in accordance with the general understandings at the international level, the Court admitted that those rights have an “essential, non negotiable nucleus that may not be restricted” and another part which is progressive and has to be defined by law (Cepeda, 2004a, 2004b:617-42). It accepts also that the minimum subsistence rights of weak groups have to be guaranteed by the State²¹⁵, i.e. ESC rights become fundamental when their violation or disregard could affect the dignity of a person and should be fulfilled immediately, even with the intermediation of the judiciary.²¹⁶

In contrast, economic authorities consider ESC rights as a goal of the State and not as a fundamental right and thus, the obligation of the State can be limited, because it is not feasible to provide all merit goods and services in an unlimited way even if the judiciary orders it.²¹⁷ The availability of public resources to provide these goods is a necessary pre-condition, but also other requirements are crucial to avoid the collapse of

²¹² The “vital minimum” concept was defined as follows: “whenever the minimum subsistence conditions are not satisfied, and urgent or stringent circumstances exist, persons are entitled to demand positive actions by the State to fulfill their unresolved basic needs, even if that entails public expenditure” (Cepeda 2004b:698). This right was adopted by the case law to avoid human situations in extreme poverty (Cf. SU 559/97 and SU 225/98 quoted by Cepeda 2004b:698).

²¹³ T426/1992, T606/1999, and SU 995/1999 quoted by Cepeda (2004b).

²¹⁴ A synthesis of the case law evolution of ESC rights is presented in Lopez (2008:21-3).

²¹⁵ Cf. SU 111/97 and SU225/98, quoted by Cepeda, (2004b:617,642).

²¹⁶ An interpretation of possible patterns of case law transplant compared the criteria used by the Constitutional Court to protect ESC rights with those of the German case law as quoted by Alexy (1993) and concluded that the Colombian Court is stricter (García and Rodríguez 2001:462).

²¹⁷ The Council of State shares this opinion, because it interprets the promotion of those rights not as a subjective right but as a goal of the State (AC 1818/ 14/07/1994).

the whole system; for example, to pay certain taxes or fees, to sign a contract, or to fulfill certain administrative procedures. They reject particularly that the Court has ordered other political bodies to supply services to people who did not respect legal or contractual requisites. Even more, they reject that the Court has taken those decisions without an explicit constitutional competence and creating new budget allocations. This way, it decides which norms are to be implemented and which are not, and what is the hierarchy among them (Palacios 2001b:6).

In an attempt to neutralize those critics, three dimensions of the APFR within the constitutional order were identified by García and Rodríguez (2001:481): (i) The *remedial dimension* referring to civil persons who have a contractual relation with the State (the state has to provide a social service) and use the APFR to improve the administrative and judicial efficiency to solve conflicts; the aim is to effectively guarantee ESC rights, although it is not used by the poorest people who represent approximately ten million persons (García and Rodríguez 2001:478). (ii) The *activist dimension* refers to cases where the Court directly applies the P.C., ignoring the law; the quality of judges has a direct relation with the consequences of this activism because they produce in many cases arbitrary rulings (García and Rodríguez 2001:479). (iii) The *legitimized dimension* finally refers to cases where APFR mitigates the tension between legal discourse and reality; this tension is compared with the one between legal certainty and justice (García and Rodríguez 2001:479).

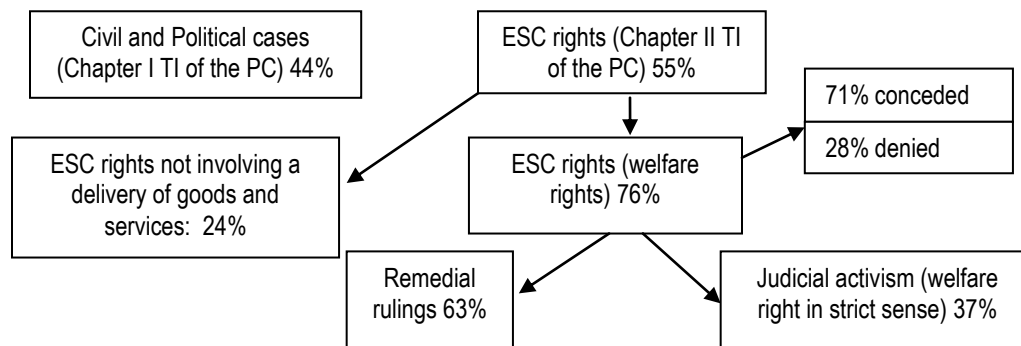
The Court argued that the cost of protecting a right is not a convincing reason to ignore constitutional rules concerning human dignity. For them, “the protection of all constitutional rights entails costs which are unavoidable” (Cepeda, 2004b:643). This way, the Court is supposed to contribute to build the rule of law through constitutional interpretation by becoming the “equity jurisdiction” and by granting more power to the weak (Cepeda, 2004b:650). These cases have been qualified as judicial activism and a contribution to the growth of public expenditure, without considering the long term macroeconomic effects; moreover, they may produce distortionary effects for social policies oriented towards the poorest population.²¹⁸

An evaluation of this doctrine on ESC rights enforcement analyzed the APFR case law of the Constitutional Court for the period 1992-2006 and concluded that APFR case law on ESC rights is more important than

²¹⁸ For some analysts the case relates to whether the Court is applying the P.C. or whether it is using arbitrary (or excessively discretionary) competences (Lopez O.2001). For others, the Court, instead of deciding on a specific model for establishing the scope of case law follows its own convenience, using common law concepts for strategic reasons (Lopez 2000:119-24).

on civil and political rights (for which the action was conceived by the P.C.). ESC rights implying a provision of a service, called “welfare rights” in the study, represented 76% of the total APFR case law on ESC rights and most of them were conceded (71%). Among these rights, those who represent the *activist and legitimized dimensions*, represented 37% of the “welfare cases” whereas the *remedial dimension* represented 63% of the cases (García and Saffon 2007).

Figure 3.2: APFR case law of the Constitutional Court on ESC rights (1992-2006)



Source: García and Saffon (2007:18-21).

Defenders of ESC right enforcement consider that economic discussions on the effects of the Constitutional Court rulings protecting an ESC right are not technical discussions but political discussions where the theoretical framework depends on ideology. The aim is not to find who is right between defenders of ESC rights enforcement and economists (Alviar 2009:17). For them, it is rather a political question that may be better solved by the legislative than by the judiciary.

The Colombian constitutional case law seems to follow the international guidelines of the Covenant²¹⁹, in spite of internal criticisms. It is presented even as an example of justiciability of ESC rights. Another question is, however, the periodical monitoring of the compliance of the country with the duties derived from the Covenant. The instrument monitors the progress in the enforcement of ESC rights by all the powers of the state. Taking as a model the report presented at the end of 2008 by Colombia, the subjective appreciation is more than evident. They present all kind of legislative and administrative acts even if they do not have a direct relation with concrete progress in the realization of ESC rights. Specific case law is mentioned by the government as positive and contributing to the compliance with the obligations of the

²¹⁹ See OUNHCHR 2005:69-73

ICESCR, notwithstanding it criticized strongly these rulings when the reports on the compliance with IMF arrangements were presented to the IMF (see chapter 5 and 6). The State recognizes that the ICESCR has a regulatory character in the country by special disposition of the P.C. (93, 4, 6)²²⁰. This report on ESC rights enforcement described the legislative developments of the general provisions of the Covenant, with the corresponding developments in case law (jurisprudence) (E/C.12/COL/5: 2009: 33- 55).

3.8 The IMF and the structural adjustment arrangements

3.8.1 The Political Economy of IMF Programs

The analysis of the relation between structural adjustment and macroeconomic success has been mainly focused on growth and inflation (Crisp and Kelly 99:535). Latin America has been the region that followed most structural adjustments in terms of the “extent to which (they were) advocated” (mainly “trade liberalization, exchange rate, tax reform, financial reform and public enterprise reform and privatization”) and in terms of “the concentrated time period over which it occurred” (Crisp and Kelly 99:535 and 537).

Delving deeper in the political economy of IMF programs, some analysts consider those arrangements as instruments used by governments to impose unpopular policies (Przeworski and Vreeland 2000). Others are of the opinion that the IMF does not respect the sovereignty of the countries to choose and implement their economic policies. Some analyses revealed that the willingness of the country to reform appears to have an important impact on accomplishment. Dreher confirmed that conditions are the result of a bargaining process between governments and the IMF, and therefore, governmental agendas are more relevant than to IMF policies. As a result, the conditionality of the IMF cannot be seen as responsible (or not) for economic performance because the reforms would be implemented even without the arrangements (Dreher 2005b:18/9; Dreher 2003:102). In fact, the role of IMF conditions may be influenced by elections, because new governments like to support unpopular measures in the IMF arrangements and therefore they are larger after elections and not interrupted before elections to avoid consequences for the government but also for the perception of the IMF programs (Dreher and Vaubel 2004:3-4; Dreher 2003:103).

²²⁰ For instance, the country mentioned the general progress and the work in progress on the establishment of indicators to evaluate the advancement of the country in complying with the Covenant (E/C.12/COL/5: 2009: 25-9) It referred also to the creation of the Presidential Agency for Social Action and International Cooperation to channel national and international resources to implement social programs for vulnerable groups (poverty, drugs trafficking and violence) (E/C.12/COL/5: 2009: 31).

New political economy and Neo-institutionalist approaches ²²¹ are relevant for the study of the IMF because they focus on the relationship between legal institutions and economic growth. However, one of the major concerns has been the political character of the relations between the IMF and borrowing countries and has been described at length (Swedberg 1986) and often criticized. Most analysts see the IMF thereby as an active player, but while some emphasize its autonomy as a bureaucracy, others emphasize that the Fund acts as an agent of its major stakeholders (Bird 2007:701). A first way to approach (and test) the political character of the IMF programs, is by focusing on the role of political proximity between the country and the IMF (and its major stakeholders). An alternative approach would be to test whether IMF programs follow agendas promoted by the IMF and its major stakeholders and are therefore not necessarily adapted to the needs of the borrowing countries. Further results of critical empirical tests of the enforcement of conditionality, the role of political cycles, and the effects of IMF programs on growth and related variables are also presented in next sections.

3.8.1.1 Political proximity and the decision to lend

One issue is whether the political proximity between (potential) recipients of IMF support, on the one hand, and the major shareholders (the US in first place), on the other, matters for the access to and the modalities of the support. Momani (2004), for example tested the claim of a technocratic and independent IMF in a study based on former confidential reports, trying to find a relation between political intervention and loans conditionality. The hypothesis was that when the conditions are repeatedly unaccomplished, the political intervention increases (Momani 2004:880-1). The process of approval of conditions is defended by former members of the IMF, trying to show that the process is designed to avoid political intromission (Gold 1977:46-4; Southard 1979; Stiles 1991, quoted by Momani 2004:884). However, other evidence allows to conclude the contrary: (i) many loans have been directed to countries that largely unaccomplished IMF conditionality; (ii) the executive board does not approve all the credits; (iii) a small number of countries has a large voting majority inside the board (Momani 2004:884-5). As a result, particularly the US has an influence on both the loan approval and the design of conditionality; even more, in some cases the arrangements are lenient and approved against the recommendations of IMF staff based on article IV consultations (Momani 2004:898-9). Thacker (1999) found evidence of US influence on the pattern of IMF lending, using data on voting behavior at the UN General Assembly. More recent studies like Barnebeck

²²¹ Neo-institutional economics is one of the most relevant approaches for the analysis of the functioning of international organizations. It analyses their institutional capacity in an interdisciplinary perspective (Thompson and Snidal 1999:707-11).

Anderson et al. (2003), Dezalay and Garth (2002), Dreher and Jensen (2007), and Dreher and Sturm (2006) also suggest US influence. But other empirical studies did not support the thesis of political influence and the value added of political variables in economic models (Bird and Rowlands 2001; Bird 2007).

Dreher and Jensen (2007) presented a panel data analysis of 206 Letters of Intent, extended from Dreher (2004a), signed between 1997 and 2003 by 38 different countries. Political proximity is thereby measured on the basis of voting behavior in the UN General Assembly. They show that, in effect, political proximity with respect to the US translates into fewer conditions in the Letters of Intent; moreover, this relationship is even more outspoken in pre-electoral periods. The same data of the Letters of Intent is used in Dreher, Sturm and Vreeland (2006), and combined with data on participation of countries in IMF programs over the period 1951-2004. They found that vote trading also happens in the UN Security Council (UNSC). Temporary UNSC membership seems to be positively related with participation in IMF programs and negatively with the number of conditions in the Letters of Intent. In addition, Dreher, Marchesi and Vreeland (2008) showed that voting behavior in the UNSC in line with the US position would explain a positive bias in IMF forecasts of growth and inflation for recipient countries, especially in pre-electoral periods. These effects should be seen in combination with other effects. Dreher (2004a) showed elsewhere that the number of conditions decreases with higher economic freedom and 'good' macro-economic policies (proxied by the current account balance). This empirical analysis used panel data on 43 countries between 1987 and 1999.

A number of authors have also investigated the extent to which the IMF takes political cycles and other political variables in the supported countries into account. They found evidence that elections do not only negatively affect compliance (especially in the electoral period) but that the IMF shows a capacity to handle electoral periods in flexible ways. Critical voices sustain that the IMF seeks to influence electoral results in an indirect way. Dreher (2003) uses panel data for 104 countries over the 1975-98 periods of time, and shows that program incompliance tends to increase in pre-electoral periods, particularly in less democratic countries. Suspicion about interference with domestic political processes is further nurtured by case studies showing that the IMF has entered in arrangements just before elections on several occasions or that the IMF has not interrupted programs in spite of non-compliance on other occasions (Dreher 2003:104-9). Dreher (2004b) showed the existence of electoral cycles in the conclusion of IMF programs. Particularly when growth rates are not too low, governments and the IMF avoid to sign agreements in pre-electoral

periods, because apparently then the electorate tends to assimilate such moves with incompetence and sanctions to the politicians.

Kauffman (2000) points out that the IMF systematically leaves military expenditure out of the conditions imposed on government expenditure in borrowing countries, leaving a significant margin for maneuvering when dealing with different political regimes. Joyce (2005) showed that the time span that countries spend in IMF programs, which has lengthened over the recent decades, depends not only on economic variables but also on political variables, reflecting the regime type of the country in question. The higher the democratic character of the regime, the shorter the time span is likely to be.

3.8.1.2 The effect of IMF programs on economic growth

The economic results of IMF programs have also been criticized. Evrensel (2002) argued that IMF programs do not improve fiscal or monetary policies. Peemans (2002:183) added that adjustment policies have not solved the debt crisis in developing countries, on the contrary debt/exports ratios have even increased, often notoriously. Dreher and Vaubel (2004) showed that the number of conditions has no significant impact on targets and instruments of recipient governments (government consumption, government budget deficit, monetary expansion, international resources, current account balance).²²² However, participation in Standby and EFF programs seems to have a positive impact on fiscal policy (reduction of budget deficit) and monetary policy (reduction of monetary growth) (Dreher 2005a). The amount of money disbursed or the degree of program completion do not show significant effects. A recent review of the literature (Bird 2007) found, referring to the current account of the balance of payment, significant positive effects, contrary to the findings of earlier studies. In contrast, with respect to inflation, no net effects were found. The most serious criticisms are based on quantitative studies showing no or even negative effects on economic growth in borrowing countries (Przeworski and Vreeland 2000; Hutchison and Noy 2003).²²³ Although earlier studies found little or non-conclusive evidence of the impact of IMF programs on economic growth, or found that these were basically depending on the estimation strategy which was chosen (Conway 2003), more recent studies often found negative effects, especially in the short run, but some studies found positive effects in the long run (Bird 2007). The average negative output

²²² Their analysis was based on panel data analysis of 206 Letters of Intent, signed between 1997 and 2003.

²²³ On the related issue of program implementation, see, Arpac, Bird and Mandilaras (2008).

effects were particularly influenced by negative Latin American experiences (Hutchison and Noy 2003). However, Crisp and Kelly (1999) found that structural program alleviated poverty in this region.

Dreher (2005b) built further on these studies and distinguished between three channels through which the IMF influences growth in member countries: the loans disbursed, the conditions attached to them, and its policy advice. Using panel data for 98 countries over a long period of time (1970-2000), he also found a net negative effect on growth. Looking at the three different channels, compliance with conditionality did seem to have a positive effect on growth, but too small to compensate the negative effects of the other channels. Easterly (2002) focused on repeated adjustment lending and applies different empirical techniques, but he did not manage to find an effect on growth neither. The negative effects on growth are used by the critics of IMF intervention as evidence of the failure of the recipes of the IMF, known as the Washington Consensus (Box 3.1) (Lavérie 2001:31-4).

Box 3.1 Summary of the principles of the Washington Consensus

- | | |
|-------|--|
| i) | Fiscal policy discipline; |
| ii) | Redirection of public spending from indiscriminate (and often regressive) subsidies toward broad-based provision of key pro-growth, pro-poor services like primary education, primary health care and infrastructure investment; |
| iii) | Tax reform – broadening the tax base and adopting moderate marginal tax rates; |
| iv) | Interest rates that are market determined and positive (but moderate) in real terms; |
| v) | Competitive exchange rates; |
| vi) | Trade liberalization – liberalization of imports, with particular emphasis on elimination of quantitative restrictions (licensing, etc.); any trade protection to be provided by low and relatively uniform tariffs; |
| vii) | Liberalization of inward foreign direct investment; |
| viii) | Privatization of state enterprises; |
| ix) | Deregulation – abolition of regulations that impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudent oversight of financial institutions; and, |
| x) | Legal security for property rights. |

Source:http://en.wikipedia.org/wiki/Washington_Consensus#List_of_Recommendations visited 27/08/2007

A related issue is the prolonged use of IMF lending arrangements. It is traditionally justified referring to the ‘multi-stage’ nature of structural adjustment, but empirical studies suggest that the reality may be a lack of effectiveness of IMF programs. Political pressures, bureaucratic biases and “defensive lending practice” were identified as obstacles to the binding force of the arrangements (Marchesi and Sabani 2005:2-3).²²⁴ An empirical analysis showed that the IMF “is positively influenced by the length of its relationship with a borrowing country”. This coincides with the theoretical hypothesis that in longer relations, the IMF is

²²⁴ Another mechanism concerns the judicialization of defaults, which have been designed under the parameters of the US bankruptcy law and the institutional perspective (Sgard 2004).

concerned with its reputation and therefore it lends easily to assure certain results. Its reputation as creditor but also as monitor is at stake and therefore there may be a strong reason to avoid punishment for non-compliance and continue a sequence of arrangements that do not produce satisfactory results. They concluded that the role of the IMF should be limited to periodical and limited evaluations of the commitments, excluding specific policy measures (Marchesi and Sabani 2005:28-30).

3.8.2 Structural adjustment of legal institutions

Structural reforms are supposed to adjust the legal institutions to solve economic problems as the debt crisis and the interaction between international markets and state interventions (Peemans 2002:141,159; Mattei 2005b). The compatibility of IMF conditionality with the competences of national powers, and with the actions of other Multilateral Organisms working in related fields is an issue which is not resolved. Neither is it clear to what extent the IMF structural reforms are binding for national authorities (including the judicial branch), nor the way to coordinate the national powers in the negotiations of the arrangement.

Adjustment and globalization are seen as an entire part of economic development in which state performance is evaluated from an international perspective (Peemans 2002:155-7). The theoretical basis of adjustment assumes that market dynamics warrant stability after crisis (Peemans 2002:141) and development is associated with GDP growth. Multilateral organizations (UN and Bretton Woods System) are seen as new international market regulators with a crucial role in these adjustment processes, mainly through the control of information, financing and research on development (Peemans 2002:141,159; Mattei 2005b). However, whether the relation between legal institutions and growth is one of conditionality or causality is not clear. Some analyses point in the direction of a symmetric interrelation between the reform of legal institutions and the improvement of economic growth. Many empirical studies have been trying to explain this relation but without conclusive results (Burgos 2006:9-16, 47).²²⁵

For the analysis of the international financial architecture and its relations with the nation-state, many approaches can be used. The normative EAL approach rejects state interventions because it provokes

²²⁵ A relevant study was the one based on a set of indicators on the relation between legal institutions and growth developed by the World Bank to support their adjustment programs (Burgos 2006:65). From their analysis it was not possible to determine which institutions directly affect growth, nor the relevance of each of them. Hence, the use of those measurements cannot delineate institutional reforms (Burgos 2006:67-8). Econometric measurements failed to prove a net and empirically demonstrable relation between law and economic development; the relation between institutions and growth may be bi-directional and other factors influence economic growth (Burgos 2006:79).

recurrent disequilibria in developing countries, more than market imperfections did.²²⁶ This hypothesis is often associated with the postulates of the Washington Consensus, supported by the IMF and the World Bank (World Reports of 1997, 1999/2000, 2002; Peemans 2002:145; Stiglitz 2002; Burgos 2006). In fact, the EAL hypotheses are considered as having been strongly supported and expanded by the World Bank, the IMF and the WTO (Mattei 2005b). As a result, many activities were privatized, giving prevalence to private law approaches. The efficiency criterion defended by EAL became the basis of many policy prescriptions of the “Washington Consensus” and structural reforms promoted by these institutions, which in turn expanded the “US based legal consciousness”. “[E]fficiency reasoning” is hence converted in the “polar star of legal interpretation” (Mattei 2005b). However, despite that many legal theorists accept the evolution of EAL towards Legal Pragmatism, due to the loss of confidence in the objectivity of the “efficiency-based discourse”, international financial institutions continue to adhere to the criterion, taken from academia and expanded into the policy area. Its doctrine, focusing on the limitation of the role of the State and its non legal positivist perspective, made that legal analysis is being performed “outside of local technicalities”, and is adaptable and applicable in different environments. Conditionality of financial institutions is thus the way to impose the “efficiency reasoning in the law” and concepts as “soft law, default rules, social norms etc.” are used to minimize the traditional role of the State as regulator of the market (Mattei 2005b). The recommendations of IFI depart from the hypothesis that the legal system has a crucial role in development and hence, coordinated economic and legal issues would, from the perspective of EAL, better control economic crises and achieve structural adjustments (Del Granado and Mirow 2005:30-3).

The “private law approach” of EAL also criticizes other approaches to economic development as the neoclassical approach in which growth is connected with capital accumulation and the public law approach which emphasizes regulation and planning. The EAL approach also suggests differences with the Washington consensus approach (developed by the World Bank and the IMF)²²⁷, whose hypothesis is that markets always work, even in poor countries. The EAL approach shares the criticisms of the public law approach but rejects the emphasis on “the crucial importance of law for a market economy” (Cooter and Schäfer 2007:2-3).²²⁸

²²⁶ In the 1980s the developmental model in Latin America was seen as responsible for the collapse of the state due to the incapacity to provide public goods (Schor 2006a:23).

²²⁷ The mechanisms to foster development suggested by this approach include: deregulation, privatization, opening-up of the economy to the world markets, and sound macroeconomic stabilization policies (Cooter and Schäfer 2007:2-3).

²²⁸ The model was performing well in East and South Asia and in Central Europe, but it was a fiasco in the former USSR and led to stagnation in Latin America (Cooter and Schäfer 2007:21-2). The case of Latin America is quoted as the focus of an academic

Alternative ideas on development propose the design of a legal framework based on justice and accountability to support the ‘independence’ of governments from the (bad) influence of international financial institutions (Mattei 2005a:14). The main idea is that legal transplant of “obsolete legal ideas and conceptions” from Europe and/or the US, plays the same role as imports of obsolete technology that favor dependency and depresses local innovation (Mattei 2005a:15). Global law, supported by the IFI, cannot be designed at the international level and imposed by arrangements with country members in the framework of specific conditionality. Judicial adjudication is crucial for the legal design and thus, those arrangements should consider it (Mohr 2007:58-9; see also, Stiglitz (2002:110); Edwards (1992)). In fact, the criticisms mainly refer to the non-adaptedness of the uniform reform packages to the specific situation and needs of individual countries (Spence Commission, quoted by Rodrik 2008:3; Lavérie 2001:31-2; Sorel 1996:60-1). In addition, the excess of policy recommendations to reduce the role and scope of the State (Peemans 2002:141,145; Schor 2006a:23) and the strong power of the IMF, whose conditionality attracts other sources of international financing,²²⁹ has been used as a model for other organizations to protect their resources²³⁰ (Sorel 1996:65; Garay 1999).

3.8.3 The legal character of IMF arrangements

A first relevant issue related to the IMF is the legal analysis of the conditionality from the point of view of international law. One approach considers that the most important question is to find procedural ways to coordinate the different competences of national authorities and international institutions that have relevant roles to play with respect to the national economy (Direction du Trésor, 2002).²³¹ Another perspective identified three topics of international law that can be connected to conditionality: the principle of responsibility, the principle of non-interference in internal affairs, and the principle of equality of sovereign States. According to Sorel (1996), it is difficult to establish responsibilities for the country or the IMF because the latter created a system of protection to assure that it cannot be held responsible for the

debate that led to the design of a new agenda for development, the ‘Barcelona Consensus’ (2004), centering on institutional quality in development policies, including the countries’ specific characteristics (Cooter and Schäfer 2007:28).

²²⁹ Such as private banks, the Bank for International Settlements (BIS), the UNCTAD, the Lomé IV convention and the World Bank (Sorel 1996:65)

²³⁰ The Asian Development Bank (ADB) and the Inter-American Development Bank (IDB) are quoted (Sorel 1996:65)

²³¹ The transfer of State competences to a large number of entities and levels with superposed and obligatory regulatory capacity has been studied extensively. Some analysts seek to internalize the externalities that this dispersion of agents with regulatory capacity is producing. They recognize the nation state, but investigate the mechanisms to coordinate these multiple levels of regulation. This approach is referred to as multi-level governance (Hooghe and Marks, 2001; Deepak, 2003). Although this approach is relevant, it will not be developed further because it leads us too far from the core issues in this thesis.

consequences of those arrangements, nor for their default. The framework, designed mainly by Gold, obstructed the establishment of a legal link between the loans and the approved facilities (Sorel 1996:60; Sgard 2004:17). The principle of non-interference cannot be alleged against the IMF neither, because the State approved the facilities. The unwillingness to individualize policies in accordance with the needs of each country is linked with the potential consequences from an international law perspective, because this individualization may imply a judgment of internal policies. Finally, the apparent violation of the equality principle among countries is also related to the individualization of policies for each country, because the IMF argues that any differences in treatment relate to differences in the economic variables (Sorel 1996:61).

However, the absence of legal consequences does not imply the absence of effects for the State, especially in the international credit arena. These consequences are not automatic and they may be negotiable, but in any case, it is possible to consider the non-accomplishment as a fault from an international law point of view (Sorel 1996:48-9). Therefore, Sorel proposed that conditionality should be analyzed not from the perspective of international law but from the legal framework of international economic relations, because the economic perspective is more important than the legal perspective (Sorel 1996:49). This option is explained as a sort of legal realism because inside the IMF, the experts (which are mainly economists) and the Board of Governors decide and the legal department just provides the legal form and specifies its interpretation.²³² It does not follow a rigid legal formalism, as the evolution of conditionality shows (Sorel 1996:49).

In fact, it was expressly recognized that lawyers prefer “hard law” whereas economists are more oriented towards “soft law” (Gold 1983:481-2). Conditionality is thus classified as “soft law” because it is an intermediate point between the total absence of legal commitments and a formal legal agreement. This ‘informal character’, introduced in 1952, has been highly controverted in relation with the right to development, particularly in the sphere of the United Nations because these “flexible legal duties and sanctions” were accused of interfering with the sovereignty of states. This flexibility is explained by the strong influence of Anglo-Saxon countries (US and UK) in the early stages when the IMF policies were delineated; in fact, the Common Law legal systems are considered as the theoretical basis of this kind of international economic law. Soft law is perceived as “a kind of fiction” in which the States know the

²³² This is where Gold played a central role (Sorel 1996:47-50).

consequences of financial and monetary marginalization, and accept structural adjustment programs to obtain credits, without a specific legal contract. The sanctions are clear from the point of view of the international economic order but they are not stipulated in a specific clause. Conditionality can be considered as regulated by the framework of international standards (Sorel 1996:60-2).

IMF structural arrangements are thus not a foreign source of law, *strictu sensu*, because they do not have the status of international treaties. Rather, the relations between the IMF and the borrowing country should be understood as political and financial, which poses a problem for domestic legal institutions at the moment of deriving their legal consequences.²³³ But the case of IMF conditionality is not necessarily unique in the international arena. After 1945, international law has been producing different varieties of rules depending on their binding character (Riedel 1991). The explosion of international organizations is seen as one of the causes of the growing complexity of the international law-making process (Riedel 1991). 'Hard' positive (international) law creates obligations and subjective rights whereas 'soft' (international) law refers to a sort of "imperfect obligations" (Riedel 1991).²³⁴ Another definition of the latter is "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects" (Senden 2004:112, quoted by Schäfer 2005:2). International standards are considered soft law, characterized by their lack of binding character in the decision-making process of the three branches of power inside the country.²³⁵ Soft law is qualified as a positive evolution of international law which creates "cooperative instruments" without specific sanctions (Riedel 1991). Standards may also be seen as a development of the UN Charter (13) that supports a "progressive development of international law" (Riedel 1991).

However, the notion of soft law is criticized because –from a legal point of view- it is more appropriate to talk about "pledges" in contrast to contracts (i.e. treaties, from an international perspective) (Raustiala 2005:582). At the international level, the negotiation of pledges is a way to moderate the trends of non-compliance of treaties because they allow states "to accept more risks in the face of uncertainty" (Raustiala 2005:582). Soft law has a very heterogeneous character and many international acts are qualified as soft

²³³ Frankel (2003) realized an analysis on the institutional capacity of national institutions and the role of the IMF and concluded that the support of IMF is positive despite its critics, particularly because other international institutions cannot provide the same assistance.

²³⁴ The antecedent of this classification is attributed to Austin who introduced the terms "laws properly so-called" and "laws improperly so-called" (Riedel 1991).

²³⁵ ESC rights are quoted as an example because they are simple parameters that should be converted into binding rules at the national level. They are labeled as norms of aspiration. ILO conventions are qualified as soft law (Riedel 1991).

law (Raustiala 2005:583). However, in general, almost all the legal acts are ‘pledges’ when they are not binding but have legal consequences, and ‘shallow contracts’ when they are binding but with default in the enforcement provisions²³⁶ (Raustiala 2005:587). The choice between pledge and contract at the international legal level is a choice “between employing and avoiding law” (Raustiala 2005:590). The reasons why states chose pledges include: (i) they are more flexible; (ii) they are more “preliminary” (“less precedential and public”); (iii) they can be signed by entities that cannot sign treaties; (iv) they almost never have to be ratified or approved by the legislative (Raustiala 2005:591; Riedel 1991). From the internal point of view, pledges allow governments to evade “domestic political pressures”. Notwithstanding, treaties approved by the legislative involve “widespread domestic support and [are] therefore more credible” and their compliance is more plausible (Raustiala 2005:598).²³⁷ States comply with soft law when they are willing to cooperate, provided that there are no “authoritative interpreters”. However, hard law compliance depends also on the willingness to cooperate. In some cases, soft law is a way to exclude other powers such as courts, and hence it is a way to regulate with less binding character but that may well influence behavior (Gersen and Posner 2008:44-5).

Empirical analyses found that pledges are less present in environmental, human rights and trade matters whereas they are frequent in ‘technocratic cooperation’ issues that do not attract the action of domestic interest groups (for example, the regulation of securities, antitrust enforcement, monetary cooperation, and sovereign debt restructuring) (Raustiala 2005:600). According to Raustiala (2005:613) treaties are always the best option and pledges come in second place²³⁸; however, a balancing of “substantive obligations” and “the legality and monitoring of agreements” may yield a preference for pledges when the uncertainty is higher vis-à-vis “the cost of commitments or the best way to organize cooperation”. When the obligations are too strict and their flexibility is low vis-à-vis new situations or emergent problems, the effectiveness of the treaty or its approval may decrease. According to the author, cases of detailed regulation are examples of deep contracts, typical of organizations as the WTO, the IMF structural adjustment agreements, the European System of human rights, and the Rome Statute of the International Criminal Court; they are quoted as examples of “agreements whose depth may exceed the optimal level” (Raustiala 2005:613-4).

²³⁶ He classified ICESCR in this category (Raustiala 2005:588).

²³⁷ In the US, the way in which courts should evaluate soft law issued by national authorities was analyzed. Soft law enacted by Congress is suggested to have an interpretative character of hard law (Gersen and Posner 2008:33-5).

²³⁸ Raustiala (2005:605-7) analyzed the structure of international agreements from the perspective of enforcement (by courts).

Soft economic law inside the IMF is one of the typical cases quoted besides the case of the OECD and, more recently, the EU. These organizations introduced a “non binding procedural solution to overcome competing visions of the organizations’ purposes”. Soft law was particularly adopted in case of “institutional crisis” when formal agreements were not realizable and adopted the form of “multilateral surveillance”, first used by the OECD to supervise national economic policies (Schäfer 2005:2,6). The IMF introduced it as a reaction to “a profound disagreement among its members on how to react to the breakdown of the Bretton Woods system of adjustable pegs”, especially with respect to the choice between fixed or floating exchange rates (Schäfer 2005:9).²³⁹ Surveillance was implemented to control exchange rate policies but also national economies, which would be analyzed by the Executive Board, and sought to protect the international monetary system. However, the growing scope of this surveillance did not imply a higher degree of delegation of sovereignty. The IMF cannot enforce its recommendations, and therefore, it does not have any relevance in countries that do not need financial support (Kahler 1988:386, quoted by Schäfer 2005:12). Therefore, compliance is a voluntary act and surveillance is a form of providing mutual opinions on the functioning of the international monetary system but without a binding character for countries (Schäfer 2005:12).

3.8.3.1 Soft law in the design of IMF conditionality

The legal design of the IMF confirms that in economic matters, soft law is characterized by an “intended vagueness of the obligations that it imposes or the weakness of its commands” (Gold 1983:443). The main characteristics of soft law from an IMF perspective are: (i) the intention to be respected, (ii) the enactment (promulgation) is not discussed; (iii) the legal character is not lost because of its non-observance; neither may this non-observance be seen as a breach of an obligation, nor can the actions that respect soft law be declared as invalid (Gold 1983:443). The use of soft law by the IMF is justified because of the big economic differences among states, particularly in terms of development (Gold 1983:444). The influence of the US in the negotiation of the exchange rate provisions of the second amendment is recognized as an antecedent of the development of soft law in the international monetary system because the US rejected a “supranational authority” ruling on the US economy (Gold 1983:458-9). Once the implementation of soft law was accepted, some safeguards were proposed to avoid problems with the liberty of the members to define their exchange rate. The first safeguard provided to the IMF was the function of surveillance of the International Monetary System, which was the surveillance of the compliance with the obligation of article

²³⁹ For more details of this controversy, see Schäfer (2005) and Gold (1983).

IV section 1 (Gold 1983:481-2). Some sanctions directly derived from obligations related to the international monetary system were discussed. Their aim was to ensure the observance of obligations or to sanction its violation. However, the IMF has not been using the term 'sanction' because some sanctions are not directly related to the violations of obligations and hence, the term 'remedy' is preferred. Three categories were identified: (i) those seeking to "safeguard the resources", (ii) those seeking to "promote appropriate policies of adjustment"; and (iii) those that punish the violation of some obligations, although it is not necessarily always the case. According to the technique employed to sanction the countries, these remedies were classified as: (i) peer judgment; (ii) publicity; (iii) increased burdens; and (iv) the denial of benefits. However, these measures were not neatly defined (Gold 1972:738-9).

A different perspective on IMF arrangements considers that international law has also been used to solve domestic problems, mainly through the generation of "information on the behavior of politicians in future periods", by international enforcement, or by delegating decision-making authority to an independent international actor (Ginsburg, Chernykh and Elkins 2008:213-4). IMF arrangements are considered as a way to make "commitment[s] credible in a way that simple domestic promise could not" and –this way- to attract international capital (Ginsburg, Chernykh and Elkins 2008:219). Those commitments are also "a better device to entrench policies simply because it is typically more difficult to implement than ordinary legislation" (Ginsburg, Chernykh and Elkins 2008:220). Sometimes this delegation is made to international organizations that are not internally accountable, which may erode internal credibility but may produce uncertainty because the international environment is unstable (Ginsburg, Chernykh and Elkins 2008:222-3).

Another perspective argued that countries belong to international organizations because they obtain benefits. For instance, it has been shown that temporary members of the UN Security Council benefit from US credits and IMF and World Bank supported programs (Dreher and Voigt 2008:2). The delegation of national competences to international organizations is a way to increase credibility and then, other benefits are obtained as a major flux of investment (Dreher and Voigt 2008:3-4). This study is particularly interesting because it analyzed whether a delegation of competences to an international organization influences governmental behavior in a way that it is less probable that it breaks its promises (Dreher and Voigt 2008:6). They concluded, first, that "higher degrees of membership in international organizations are robustly correlated with lower country risk ratings", second, that "the longer a country has been a member of an IO, the better its risk rating, *ceteris paribus*", and third, that "membership in IOs is particularly

important for a country's credibility when domestic institutions are weak". This means that credibility is not only "made" but also "bought" (Dreher and Voigt 2008:25).

3.8.3.2 The legal scope of the IMF conditionality

The principal nature of the IMF has been identified with its main competence: surveillance. Its essential responsibilities are derived from "the relationship between surveillance and conditionality". Conditionality "presupposes (and) contributes to the effectiveness of surveillance". The IMF is supposed to seek for a "balance between conflicting aims", which depends on the point of view of the members and therefore "principles like universality, uniformity, neutrality and flexibility, if properly combined, can play a critical role". An analysis of the pertinence of a code of conduct for the IMF, and the nature of its obligations concluded that discretionary competences of the IMF are needed to implement their programs, which does not mean that discretion is "a feature of the rule itself". Discretion and the balancing process "between rules and discretion", are justified by the need to "balance between principle and practice, or between what is important and what is urgent" as it occurs in daily life (Gutián 1992: 44-6).

From an international legal perspective, the complexity of the topic is related to the *sui generis* character of IMF support to its member states. Conditionality has evolved over time and it is seen as a contribution to the gradual transformation of the IMF from an international monetary organization, charged with exchange rate stabilization, to an international organization for financial assistance to developing countries (Lavérie 2001:10; Garay 1991).²⁴⁰ The conditionality of IMF loans to Latin America and, more in general, to developing countries has repeatedly been criticized, and qualified as a political instrument (Sorel 1996; Stiglitz 2002:71; Direction du Trésor 2002). For the IMF, conditionality seeks to safeguard the character of the fund's resources and to promote the achievement of program objectives, particularly, a viable external position. It provides assurances to members, delineating the conditions under which they can obtain Fund financing (IMF, 2001:5). However, in practice, the coercion of conditionality seems to depend on the "asymmetry of power" between the country and the IMF, but mostly it is determined by the need of the country to have "access to alternative sources of finance" (Collinwood 2001 quoted by Buirá 2003:5).

The term conditionality refers to the economic policies suggested or imposed by the IMF to countries that will use the resources of the IMF, in accordance with the Articles of the Agreement (Gold 1979:1 quoted by

²⁴⁰However, the IMF has not been a financial aval to mitigate economic problems of developing countries (Sorel 1996:60).

Sorel 1996:47). The discussion on conditionality in a developing country context only started in the 1980s, but it is necessary to go further back in time to understand the legal nature and scope of IMF conditionality. The topic can be traced back to the very negotiations on the creation of the Fund and, more specifically, to the discussion on the conditions applying to member states to buy currency of another member in exchange for its own currency. Whereas the British position, supported by other West-European countries, emphasized the rights and autonomy of the members, the US position favored a stronger Fund with a right to challenge requests from members (Denters 1993:52-6).

In the 'Joint Statement by Experts on the Establishment of an International Monetary Fund' of April 1944, the relevant paragraph reads as follows: "III.2 A member shall be entitled to buy another member's currency from the Fund in exchange for its own currency on the following conditions: (a) The member represents that the currency demanded is presently needed for making payments in that currency which are consistent with the purposes of the Fund [...]" (Denters, 1993:55). The consensus text was deliberately left unclear as to the Fund's right to challenge, and the basis for challenging. This fragile consensus was practically left out of the discussion at the Bretton Woods Conference of July 1944 (Southard 1979; Denters 1993). The text included as art. V Section 3 of the Statutes was almost identical to the one of the Joint Statement.²⁴¹ The text was ambiguous and therefore the issue was taken-up again and discussed after the ratification of the Statutes. The IMF's right to challenge, which is the corner stone of conditionality, was formally recognized in a Decision of the Executive Board of May 1947.²⁴² The Board further decided in 1948 that the reference to the 'provisions of the Fund Agreement' in Art. V Section 3 had to be broadly interpreted, including the general purposes of the IMF contained in the statutes (1), and not only other articles that include more technical provisions. This again strengthened the IMF position (Denters 1993:62-

²⁴¹ "Conditions governing the use of the Fund's resources (a) A member shall be entitled to buy the currency of another member from the Fund in exchange for its own currency subject to the following conditions: (i) The member desiring to purchase the currency represents that it is presently needed for making in that currency payments which are consistent with the provisions of this Agreement [...]" (Denters, 1993:57).

²⁴² "The word 'represents' in Article V, Section 3(a) (i) means 'declares'. The member is presumed to have fulfilled the condition mentioned in Article V, Section 3(a) (i), if it declares that the currency is presently needed for making payments in that currency which are consistent with the provisions of the Agreement. But the Fund may, for good reasons, challenge the correctness of this declaration, on the grounds that the currency is not 'presently needed' or because that currency is not needed for payment 'in that currency', or because the payment will not be 'consistent with the provisions of this Agreement'. If the Fund concludes that a particular declaration is not correct, the Fund may postpone or reject the request, or accept it subject to conditions. The phrase 'presently needed' cannot be defined in terms of a formula uniformly applicable to all cases, but where there is good reason to doubt that the currency is 'presently needed', the Fund will have to apply the phrase in each case in the light of all circumstances" (reproduced in Denters, 1993:59-60).

3).²⁴³ The initial discussion was concluded by the Decision of February 1952 (Denters, 1993:68; Horsefield, 1969:324). The development of these agreements in the fifties, allowed the member states to negotiate the right to draw resources from the IMF, during a specified period of time, instead of negotiating an immediate drawing. The Stand-by arrangement became the main Fund instrument to pursue its policy of conditionality and it is defined by article XXX b) of the Articles of the Agreement ²⁴⁴(Denters, 1993:70; Sorel 1996:44; Lavérie: 2001:24; Buirra 2003:3).

A further innovation, involving Latin American countries, was the introduction of the Letter of Intent. They were first drafted in 1957 by the Argentinean and Paraguayan governments (Jacobson, 1979:289, quoted by Denters 1993:72). They are a *sui generis* instrument and introduced a parallelism between the document drafted by the monetary authorities of a member state (the Letter of Intent), and the Stand-By Arrangement which is essentially a Decision by the IMF. No single (common) document is signed by both parties, although the Stand-By Arrangement refers to the Letter of Intent. However, under pressure of developing countries, In 1968 the Executive Board further clarified the scope of conditionality in Stand-By Arrangements (Dec.2603 – (68/132) 20.09.1968). Moreover, faced with rising debt levels in developing countries, they organized the G-24, to pressure for new guidelines for conditional balance-of-payments support (Denters 1993:81), to obtain a uniform application of the conditionality and, to get more legal certainty.

In 1974 the Extended Fund Facility (EFF) arrangements were established as a mechanism of long term balance of payments assistance to countries with problems that needed important structural reforms. It was created to particularly benefit developing countries, once developed countries did not need IMF assistance anymore (Gianviti 2005:5). For the Executive Board those arrangements included “policies of the scope and character required to correct structural imbalances in production, trade and prices” (IMF 2001:3).

The second amendment of 1978 changed the IMF focalization action: from an exclusive action in the monetary arena it moved towards a broader action in economic policies (art. IV); this means that the stability of the system was considered as important as the stability of the exchange rate. The IMF opted for

²⁴³ On the adequate safeguards provision in article 1 and the temporary character of IMF support, see Denters (1993:65-8).

²⁴⁴ The Stand-by arrangement for Peru (1954) was innovative because it introduced IMF monitoring and consultation during the whole arrangement period as accepted practice (Horsefield 1969:373-6; Southard 1979:19; Denters 1993:71).

stricter conditionality in the second half of the 1970s²⁴⁵ and new Guidelines were approved in 1979 (Decision 6056 (79/33)). They reiterated that the Letters of Intent and Stand-By arrangements should not be attributed an international contractual character.²⁴⁶ The Letter of Intent is essentially a (unilateral) declaration by (the authorities of) a member state about the objectives of its economic policies and a request for support by the IMF. The member state is – in principle – economically sovereign and the Letter of Intent can only be considered an agreement in a material sense, not in a legal sense, because they are drafted in close consultation with an IMF mission, because the member states do not express an intention to be bound and because it is not meant to have legal consequences, i.e. to create legal rights or obligations²⁴⁷ (Denters 1993:72, 85-6). The real nature of those documents is thus not clear; but according to Gold and the IMF, they are not a contractual document because a manifestation of intention does not exist but it is just an “intention” to act, not a legal commitment (Sorel, 1996:48).

The Stand-By arrangement is a decision of the IMF indicating the conditions under which a member state can count on IMF support.²⁴⁸ It allows the IMF also not to specify detailed conditions but, rather, to refer to the Letter of Intent, drafted by the member state itself. The Guidelines sought to avoid any contractual form with respect to the Stand-By arrangements. They define the scope of the conditionality in different paragraphs: (i) §3 clarifies that a Stand-By ‘arrangement’ is not an ‘agreement’ or contract between the two parties, but rather a decision taken by the IMF (Denters 1993:79); (ii) §4 stipulates the right to observation of social objectives and internal policies, the economic priorities and the causes of the problems of the balance of payments (Gold 1979:23, quoted by Lavérie 2001:25); (iii) §9 establishes the performance criteria, the limits to the macroeconomic variables and the criteria needed to apply the statutes and policies linked to the drawing of resources. They have further the following characteristics: (i) they are not registered before the United Nations (Gold 1979 quoted by Lavérie 2001:26); (ii) they are not submitted to the constitutional procedures of the member states (Sorel 1996:49; Lavérie 2001:26); (iii) nor the IMF, nor the states engage their international responsibility (Sorel 1996:49; Lavérie 2001). As Denters points out, the choice of a contractual form does not automatically imply that the principles of international public law

²⁴⁵ The Supplementary Financing Facility was introduced in 1977.

²⁴⁶ See Denters (1993:87-9) for a discussion of the political, juridical and pragmatic motivations behind the Guidelines.

²⁴⁷ Denters (1993:85) referred to a pronouncement of the International Court of Justice: “It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. [...] When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration [...]” (‘Nuclear Test Case’, 20.12.1974, *International Court of Justice Reports* (1974) par. 43-4).

²⁴⁸ Gold, (1970) was the first study about the legal character of the Stand-By Arrangements and it was the basis for the Guidelines on Conditionality of 1979.

(Vienna Convention) are applicable. As the IMF has not been explicit on this issue, it is the practice of the countries which should give guidance on the legal character of the loans. They avoid to consider them as international treaties (because they do not follow parliamentary ratification, publication and registration as prescribed for international treaties), and to apply the Vienna Convention (Denters 1993:108). The Stand-By arrangement seems thus to be a unilateral decision of the IMF to support a country under specific conditions. They look like a gentlemen's agreement without a binding character whose non accomplishment does not cause legal consequences (Sorel 1996:47-8). This opinion is not generalized, because some studies (Carreau and Julliard 1990:379 quoted by Sorel 1996:48) affirm that they are real international agreements, i.e. they are obligatory to the IMF and the states; but this is not the majoritarian opinion in the international community.

The debt crisis of the beginning of the 1980s, which started in Mexico but then extended to Argentina, Brazil, Chile and other countries, changed the way the IMF approached developing countries and imposed conditions on Fund support (structural adjustment) (Boughton 2004:12). The Structural Adjustment Facilities (SAF) and the Enforced Structural Adjustment Facilities (ESAF), created in 1986 and 1987 respectively, tried to respond to the problems of macroeconomic structural adjustment. Formally, the 1979 Guidelines were not applicable to structural adjustment programs but they were used by the IMF staff as reference framework (Denters 1993:107), particularly the objectives and general policy of the IMF were supposed to be applicable. Contrary to Stand-By Arrangements, SAF/ESAF required a loan agreement and had therefore a contractual character, although it was not clear what the logic was behind this differential approach (Denters 1993:107-8). One reason is that credit facilities under SAF/ESAF were not based on art. V, Section 3(b), stating that members are entitled to purchase. They were complemented by a framework document of macroeconomic policies and they had a stronger conditionality with revisions each semester. The ESAF was replaced in 1999 by the Poverty Reduction and Growth Facility. The World Bank was associated with these two new mechanisms which also required a loan arrangement and had a stronger conditionality (Sorel, 1996:65).

Procedural aspects of SAF/ESAF were further quite similar to those of Stand-By arrangements, although performance criteria are substituted by (more flexible) indicators or benchmarks (Denters 1993:109). With these "facilities", structural adjustment became more prominent at the IMF and evolved into its main activity. After the end of the USSR and the collapse of the soviet bloc, the IMF created a new mechanism to

help ex-communist countries to transform their economies. This was done through the Facility for Systemic Transformation (Decision 10348 (93/61) Annual Report (1994:164-5) quoted by Sorel 1996:57). The concept of structural adjustment, which does not have a legal definition, was established in 1986 to restore the equilibrium of the balance of payments and to seek economic restructuring, through macroeconomic measures and in some cases, micro economic (sectoral) policies (Lavérie 2001:12-3). As a synthesis, Box 3.2 presents an overview of the different types of IMF arrangements.

Box 3.2 Types of IMF Arrangements

"The IMF provides financing to its member countries under different types of credit arrangements ("facilities"). These include regular facilities (stand-by and extended arrangements) at market-related interest rates, and a concessional facility for low-income countries (PRGF) at below market interest rates, as well as range of special facilities.^{1/}

Stand-By Arrangements (STAND-BYs) were established in 1952. Originally conceived as precautionary arrangements, they quickly came to be used to meet immediate financing needs, although precautionary arrangements have continued to play a role. The duration of stand-by arrangements can vary from six months to (a legal maximum of) three years, but most STAND-BYs cover periods of one to two years; they are to be repaid within 3¼ to 5 years after the date of purchase. Policies on stand-by arrangements' phasing of purchases (typically quarterly) and conditionality' evolved in the 1950s and 1960s and were eventually codified in guidelines on conditionality, approved in 1968 and revised in 1979. Purchases beyond the first 25 percent of a member's quota are subject to upper credit tranche conditionality, which has traditionally focused on macroeconomic policies -fiscal, monetary, and exchange rate policies-aimed at overcoming balance of payments difficulties. Since the mid 1980s an increasing number of stand-by arrangements have also included structural reforms; in a few recent STAND-BYs in countries experiencing a capital account crisis, structural policies addressing financial sector problems were at the very core of the programs.

The Extended Fund Facility (EFF) was established in 1974 to provide medium-term assistance to member countries experiencing chronic or acute balance of payments problems due to structural distortions and weak growth. Duration (typically 3 years with a possible extension to 4) and repayment periods (4½ to 10 years) under EFF arrangements are longer than under STAND-BYs, but phasing and conditionality are similar. However, given the nature of the balance of payments problems the facility was designed to address, structural policies have typically played a more important role than under stand-by arrangements.

The Poverty Reduction and Growth Facility (PRGF) was established in 1999, and replaced the ESAF as the Fund's concessional lending facility for low-income countries. For programs supported by the PRGF, poverty reduction is a key element of a renewed growth-oriented strategy. PRGF arrangements (and IDA lending from the World Bank) are based on a comprehensive policy strategy set out in the poverty reduction strategy paper (PRSP), which is prepared by the country in an open, participatory process. PRGF arrangements cover a three year period, with repayments over 5½-10 years at an interest rate of 0.5 percent. Performance criteria and reviews are normally semiannual, although quarterly test dates can be used in selected cases where closer monitoring is needed.^{2/}

The predecessors of the PRGF were **the Structural Adjustment Facility (SAF) and the Enhanced Structural Adjustment Facility (ESAF)**, set up in March 1986 and December 1987, respectively. They were financed from special resources -a trust fund- and offered highly concessional loans to support macroeconomic adjustment and structural reform in low-income countries. The expected duration of programs supported by the SAF and ESAF was 3 years, and the repayment period was 5½ to 10 years. Members were expected to lay out their policy strategy in a rolling three-year policy framework paper (PFP), which formed the basis for annual policy programs supported by SAF/ESAF arrangements. Conditionality under ESAF arrangements, which effectively superseded SAF arrangements starting in 1988, was stronger than under the SAF, with semi-annual (rather than annual) disbursements and macroeconomic as well as structural performance criteria (rather than policy benchmarks only)."

1/ Special facilities have been created to meet member countries' special financing needs.
2/ This structure with a single, three-year arrangement and the possibility of quarterly monitoring also applied to later ESAF arrangements begun after early 1999.

Source: IMF (2001) (<http://www.imf.org/external/np/pdr/cond/2001/eng/struct/cond.pdf> visited on 09/08/2007).

Since the nineties, conditionality has been focused mainly on structural conditionality (Buirra 2003:16). The multiplication of conditions in the structural adjustment programs has been notorious since the beginning of this decade due to a shift in the IMF attitude “towards structural reforms in adjustment programs”.²⁴⁹ Particularly since the document “Monitoring Structural Adjustment in Fund-Supported Adjustment Programs” was approved (EBS: 87:240, 20.11.1987) the link between structural reforms and macroeconomic performance was recognized, and therefore, policies referred to in the programs vary from financial sector reforms to governance measures (IMF 2001:9-12). Most of the structural policy measures listed in the letters of intent or in the memoranda of economic and financial policies are monitored in the framework of the program review. However, the consequences of their non-implementation are not comparable to non-accomplishment with a benchmark or a performance criterion in the macroeconomic issues (IMF 2001:5-7).

In 2001, the IMF presented the main tools employed to monitor policy implementation by member states under supported programs (box 3.3). The aim of these monitoring tools was to measure the compliance with conditionality although they were not based on a legal definition of the concept of conditionality. Neither were they the only way to evaluate structural policies, but the IMF considered them as the most concrete tool. The IMF monitors structural conditionality through a number of performance criteria, prior actions and benchmarks agreed to implement structural policy measures (IMF, 2001:8).

Box 3.3: Tools designed by the IMF to quantitatively assess conditionality.

“Conditionality entails a body of practices and procedures, generally known as program monitoring techniques. These have been adapted to monitor structural reforms. Four forms of program monitoring have been employed in upper credit tranche stand-by and extended arrangements and the Fund's concessional lending: prior actions (PAs), performance criteria (PCs), structural benchmarks (SBs) and program reviews (PRs).

Prior actions are measures taken at the outset of an adjustment program or prior to the completion of a review to improve the capacity of the program to meet its objectives. Their implementation constitutes a precondition for program approval or completion of a review. PAs are particularly important in cases of severe imbalances or a weak record of policy implementation. Prior actions for the completion of reviews are frequently applied to structural benchmarks whose implementation has repeatedly been delayed.

Performance criteria are intended for structural measures that are critical to the success of the adjustment program and

²⁴⁹ Whereas in 1987 the IMF supported programs contained on average two conditions per program year, in the period 1997-1999 they increased to an average of 14 conditions per program year (IMF 2001:9).

whose implementation in a specific timeframe is important. They need to be defined in precise, objectively verifiable terms. Their implementation constitutes a condition for purchases under an arrangement. Non-implementation by the deadline requires a request for a waiver, which the staff can support if the delay or non-implementation is not seen as overly detrimental to the attainment of the program's objectives, or if adequate compensatory measures are taken.

Benchmarks were first introduced in the context of the Structural Adjustment Facility (SAF) but are now used across Fund arrangements to monitor structural policies. They are typically used to monitor the implementation of reforms that are important but not as critical as are PCs, critical measures where the timing is less important, or critical measures that cannot be defined sufficiently precisely to constitute a structural PC. They are monitored in the context of reviews rather than directly linked to purchases. Delays in the implementation of specific SBs does not necessarily hold up the completion of a review, but a delay in a substantial number of SBs can signal a setback in meeting a program's objectives and will figure importantly in deliberations to complete a review.

Program reviews provide a framework for assessing structural reforms against established benchmarks, or progress in implementing reforms that are difficult to define ex ante with a high degree of precision, or reforms characterized by a series of smaller steps, which may be of only moderate significance individually but can make an important contribution to meeting a program's objective when a critical mass is implemented. The completion of a review is linked to a purchase. Ideally, the focus of forthcoming program reviews should be defined in letters of intent, particularly if the content of the letter of intent goes beyond the policies that are important for the achievement of a program's macroeconomic objectives.

When designing a program, four considerations are taken into account to determine the appropriate monitoring tool:

- Level of priority: PAs and PCs signal the highest level of priority; with SBs generally signaling a lower priority.
- Timing: the completion of PAs should be important at the outset of an arrangement or before the completion of a review, while that of PCs should be critical within a specific interval; the timing of SBs may be more flexible.
- Definability: PAs, PCs need to be very clearly defined,^{1/} SBs should ideally be clearly defined, but need not be, and review conditions may be specified in more general terms.
- The presence or absence of perverse incentives: PAs and PCs, and to a lesser extent SBs, being associated with specific dates, can put the authorities at a disadvantage in negotiations that may involve third parties.^{2/}

However, the above considerations may sometimes conflict with each other, so that the structural conditionality instruments used in a program will not necessarily provide a clear signal of priorities. This problem arises in particular when the highest-priority measures fail the definability or the perverse incentive test."

1/ Precise definition of PAs has become especially important since the Board's decision in July 2000 to include PAs in the text of arrangements.

2/ For instance, a specific date for a privatization can weaken the authorities' bargaining power vis-à-vis a potential buyer.

Source: IMF 2001 (<http://www.imf.org/external/np/pdr/cond/2001/eng/struct/cond.pdf> visited on 09/08/2007.)

The survey developed by the IMF to evaluate conditionality²⁵⁰, distinguished three categories of measures of macroeconomic relevance: 'critical measures', if without them the objectives cannot be attained, 'important measures', if the fulfillment of the program objectives would be difficult but not unworkable, and 'useful measures' to succeed in reaching objectives of the macroeconomic program. The IMF concluded that the survey showed more the degree of difficulty to classify structural measures according to their macroeconomic importance than their relevance for the achievement of the macroeconomic goals (IMF, 2001:35).

The IMF designed a sector classification scheme to visualize the scope of conditionality and its distribution across sectors (table 3.5). Program conditions were mostly concentrated in a reduced number of sectors

²⁵⁰ Survey among IMF staff on structural policy measures in 24 IMF supported programs (IMF 2001: Appendix II, 87).

(IMF 2001:23); in fact, structural reforms seek mainly (i) to strengthen macroeconomic stability (e.g. tax structure and administration, public expenditure control, monetary and exchange rate policies and foreign exchange and trade system); (ii) to improve the institutional capacity of the economic sectors to increase efficiency and flexibility (e.g. trade liberalization, pricing regulation, regulation of financial and corporate sectors and labor market) (IMF 2001:28).

In 2000, the IMF identified the following core areas of incidence²⁵¹: most of the conditions referred to fiscal and financial sectors, the exchange rate and the trade system and economic statistics. Within those sectors, tax reform was one of the most important structural reforms to help expenditure control, which included also civil service cuts. In the case of the financial sector, the most important conditions related to the monetary policy framework, the restructuring of the financial institutions, the reinforcement of regulation and supervision. The restructuring of public enterprises, privatization and the reform of the social security system increased their relevance based on efficiency considerations but mainly for budgetary reasons (IMF 2001:23-5).²⁵² The IMF highlighted the difficulties to present a clear panorama “from specific structural reforms to specific program objectives”. Moreover, the distribution of the reforms among the economic sectors did not necessarily show the importance of the objectives, because monitoring structural reforms is not the same as monitoring macroeconomic policies.²⁵³ The challenge was the definition of “possible structural indicators” to measure intermediate targets, but the particularities of each country increase the complexity (IMF 2001:28).

Table 3.5 Sector classification of the conditions included in Structural Adjustment Agreements.

Category	Coverage
Exchange System	e.g. lifting of surrender requirements, unification of exchange rate.
Trade Regime	e.g. reduction of tariffs and elimination of quotas.
Capital account regulation	e.g. less or no restrictions on certain types of capital account transactions, including direct investment.
Pricing and Marketing	Measures in all sectors (including the energetic sector) except agriculture, seeking to adjust regulated prices, liberalization of price setting and the operation of marketing channels (e.g. liberalizing domestic prices, reducing or removing subsidies, and eliminating state monopolies)
Public enterprises, reform and restructuring	Governance issues except privatizations.
Privatization	Measures to prepare enterprises for privatization, except in the sector of agriculture.
General government tax	Structural issues of the budget rather than macroeconomic aspects of fiscal policy This excludes

²⁵¹ Interim report of the reform task force on “the future role of the Fund” (July 2000) quoted by IMF 2001.

²⁵² The World Bank has also had a crucial role for conditions related with agriculture and systemic reforms (legal and institutional reforms, corporate governance and restructuring) public enterprises, restructuring of social security systems and social safety nets (IMF 2001:46).

²⁵³ “Monitoring Structural Adjustment in Fund Supported Adjustment Programs” (EBS:240/1987 quoted in IMF 2001).

and expenditure reform	public enterprises and social security system. Revenues: tax rate changes, tax code changes, and tax arrears reduction. Administration issues. Expenditures: measures on expenditure structure and administration. Measures on treasury systems, public employment, the wage bill and civil service reform, inter-governmental relations; resource management.
Social security system	Reform of the system of social protection for fiscal reasons or to ensure long-term viability, e.g., pension reform (reduction of pension arrears, changes in coverage and benefits), reform of public health care, rationalization of social welfare programs.
Social safety net	Measures to strengthen social protection, to alleviate the impact of economic crises on the poor, e.g., temporary public employment measures, maintenance of subsidies, increases in benefits from existing systems of programs, temporary welfare programs.
Financial sector	Restructuring, privatization, closure; reforms of the regulatory and supervisory system; central bank reform (including the operational framework of monetary policy); legal reforms of the financial institutions and financial markets; provision of statistical information in financial markets.
Agricultural sector	Land reform, subsidies to agriculture, liberalization of input or output prices, farm restructuring.
Labor market	Reform of the labor market
Economic statistics	All measures related to the provision of economic statistics
Systemic Reforms	Institutional reforms not included elsewhere, e.g., competition law, bankruptcy law, commercial code; corporate restructuring and governance; improvements in transparency more generally.

Source: <http://www.imf.org/external/np/pdr/cond/2001/eng/struct/cond.pdf> visited 11/08/2007.

Seeking to subject structural reforms to performance criteria, timetables for the implementation of the policies were justified by the need to accomplish the schedule; however, the inclusion of institutional or legal reforms was difficult. As a result, a revision of the guidelines of 1979 that recommended the use of performance criteria only for macroeconomic variables (and exceptionally in other cases) was not suggested. The program review was seen as the best tool for monitoring structural reforms and therefore they had to be specified as much as possible at the beginning of the program (IMF 2001: 53-4). This way, member states would face less uncertainty, considering that until 2001 monitoring practices showed big differences across programs and countries.

From this Survey undertaken by the IMF, some conclusions about the relative importance of the monitoring mechanisms seem to be applicable to Colombia, taking into account that the country belongs to the category of non-transition countries with Stand-by or EFF arrangements, for which, prior actions represented 17% of the total number of structural measures, structural benchmarks 44%, performance criteria 14%, and other measures included in the letter of intent 24%. Governments frequently include a broader policy agenda in the letter of intent, including commitments with other institutions as the World Bank or regional banks. As a result, some of the measures listed are not critical for the program's macroeconomic objectives and may not be assessed in the program revision. But another reading by the IMF is that an increase in the average number of structural conditions per program year can reflect a tendency to make program monitoring more detailed (IMF, 2001: 55-66).

The IMF analyzed also implementation across economic sectors: The structural reforms were better implemented in sectors as social security net, financial sector, trade and capital account liberalization and systemic reforms (institutional and regulatory reforms and corporate restructuring) (IMF 2001: 72-3). The IMF classified the reasons for non-implementation of structural reforms in two main categories and one residual. The first category, the limited implementation capacity was relevant in sectors as capital account, privatizations, fiscal, agricultural and financial sectors, economic statistics and systemic reforms. The second category, political and social opposition, was representative in the sectors of exchange rate systems, trade regime, pricing and marketing, public enterprises, reform and restructuring, social safety net and labor market. Particularly, for the exchange rate system, social safety net and labor market, when structural reforms were not implemented, political and social opposition was responsible in 100% of the cases.

Almost two thirds of structural performance criteria, prior actions and benchmarks focused on key sectors linked with macroeconomic stabilization and external adjustment: exchange rate and trade system and fiscal and financial sectors. The latter ones increased their relevance in the decade of the nineties. Restructuring and privatization of public enterprises gained also importance, although they were not necessarily critical for the accomplishment of the macroeconomic objectives; however, for the IMF, structural reforms in other sectors may have had the same weight.

Table 3.6 Implementation of Structural Measures by Economic Sector - Survey results (In % of the total structural measures)²⁵⁴

Economic sector	Implementation			
	Fully Implemented	Partly Implemented	Not Implemented	Not Known
Exchange system	66.7	28.6	4.8	0.0
Trade regime	72.3	8.5	13.1	6.2
Capital account	78.8	9.1	0.0	12.1
Pricing and marketing	44.3	25.7	22.9	7.1
Public enterprises, reform and restructuring	56.6	19.3	6.9	17.2
Privatization	44.9	22.7	22.7	9.7
Fiscal sector	57.3	24.9	9.2	8.7
Social security system	55.8	25.6	16.3	2.3
Social safety net	83.0	14.9	2.1	0.0
Financial sector	79.7	9.9	7.7	2.7

²⁵⁴ It covers all structural measures included in the letters of intent, and in the memoranda on economic and financial policies or policy matrices for countries covered by the IMF survey. It included 24 IMF supported programs. Appendix I and II

Agricultural sector	64.8	22.0	9.9	3.3
Labor market	66.7	8.3	25.0	0.0
Economic statistics	60.9	21.9	10.9	6.3
Systemic reforms	71.3	13.4	6.3	9.0
Economic sector		Reason for Non-Implementation		
		Limited Implementation Capacity	Political and Social Opposition	Not Known
Exchange system		0.0	100.0	0.0
Trade regime		17.9	75.0	7.1
Capital account		66.7	33.3	0.0
Pricing and marketing		14.7	76.5	8.8
Public enterprises, reform and restructuring		26.8	63.4	9.8
Privatization		50.5	44.6	5.0
Fiscal sector		59.4	32.9	7.7
Social security system		47.2	47.2	5.6
Social safety net		37.5	62.5	0.0
Financial sector		53.5	32.5	14.0
Agricultural sector		55.2	44.8	0.0
Labor market		0.0	100.0	0.0
Economic statistics		90.5	9.5	0.0
Systemic reforms		56.5	33.3	10.1
Weighted average of all sectors ²⁵⁵		50.1	42.0	7.8

Source. <http://www.imf.org/external/np/pdr/cond/2001/eng/struct/cond.pdf> . visited 16/08/2007

The Executive Board reformed the regulation of conditionality in 2002.²⁵⁶ The new principles of conditionality were basically the same as in the former guidelines: (i) the purpose of conditionality is to ensure that IMF resources are provided to country members in a way consistent with the Articles of the Agreement and with enough safeguards for the temporary use of those resources; (ii) Conditionality involves precautionary measures to avoid the occurrence of balance of payments problems; (iii) the country is responsible for the selection, design, and implementation of its economic and financial policies whereas the IMF only supports the program for its successful implementation; (iv) the IMF monitors progress towards social, political and economic objectives, but also particular circumstances, including the reasons behind the problems with the balance of payments and the administrative capacity to enforce the reforms; past performance of the country in the achievement of economic and financial policy goals is considered as a factor influencing conditionality, but taking into account changing circumstances; (v) the requests to use IMF resources are only approved when the IMF certifies that the program is consistent with the Fund's policies; (vi) IMF programs are focused on the following macroeconomic goals: (a) to solve problems of the balance of payments, protecting national and international welfare; and (b) to promote sustainable economic growth in the medium run (IMF, 2002: 1-3).

²⁵⁵ "Weighted by share of each sector in total structural measures".

²⁵⁶ It replaced the 1979 Conditionality Guidelines and the interim Guidance Note on Streaming Structural Conditionality of September 2000 (IMF, 2002:1).

These guidelines defined the scope of conditions, clarifying that the measures are fixed only when they are “reasonably within the member’s direct or indirect control”; they are “either (i) of critical importance for achieving the goals of the member’s program or for monitoring the implementation of the program, or (ii) necessary for the implementation of specific provisions of the Articles or policies adopted under them.” Conditionality involves macroeconomic and structural policies included in the “core areas of responsibility of the IMF”: macroeconomic stabilization; related monetary, fiscal, and exchange rate policies; structural measures directly connected and regulation of the national and international financial system. Other areas may be included with due justification. Conditions may include the particular targets of the country (‘outcomes-based conditionality’), or taking (or refraining from taking) particular actions (‘actions-based conditionality’)” (IMF, 2002:1-3). The guidelines ratified that the IMF “is fully responsible for the establishment and monitoring of all conditions attached to the use of its resources”. Cross-conditionality, understood as the possibility that the use of IMF resources may be explicitly subject to the competence of other organizations, is not permitted. However, the IMF policy advice, program design, and conditionality should be harmonic with those of other international organizations “within a coherent country-led framework” (IMF, 2002: 1-3).

The guidelines defined also the term “arrangement” as follows: “a decision of the Executive Board by which a member is assured that it will be able to make purchases or receive disbursements from the Fund in accordance with the terms of the decision during a specified period and up to a specified amount” (IMF 2002:3). Its character as not being an international agreement is reiterated, and contractual language should be expressly avoided, although the arrangements may contain appropriate consultation clauses. The country documents related to IMF programs are the Letter of Intent (LOI), the Memorandum on Economic and Financial Policies (MEFP) and/or a Technical Memorandum of Understanding (TMU). They may exceptionally present confidential policy understandings to the IMF in a side letter, but “detailed policy matrices covering the broader agenda should be avoided in program documents such as LOIs and MEFPs” except when they are necessary to the authorities “to express their policy intentions” (IMF 2002: 4).

The tools defined in the past to monitor the completion of a member’s program were re-formulated as described in table 3.7 The IMF may confer a waiver for non observance of a performance criterion when the program will be implemented; it may confer only a waiver for the applicability of a performance criterion

when despite the unavailability of the needed information to evaluate the criterion, there is no evidence that it would not be met.

Table 3.7 Monitoring tools under the Guidelines of 2002.

Monitoring tools	Scope
Prior actions.	They are measures “prior to the Fund’s approval of an arrangement, completion of a review, or the granting of a waiver with respect to a performance criterion when it is critical for the successful implementation of the program that such actions be taken to underpin the upfront implementation of important measures.” The IMF thought that an “excessive reliance upon such actions can place on members’ implementation capacity”.
Performance criteria	Its observance is established as a formal condition for the making of purchases or disbursements under an IMF arrangement. They will “apply to clearly-specified variables or measures that can be objectively monitored by the staff and are so critical for the achievement of the program goals or monitoring implementation that (...) disbursements (...) should be interrupted in cases of nonobservance.” Its number and content depend of the circumstances and institutional arrangements of the country.
Reviews.	They are directed by the Executive Board.
<i>Program reviews</i>	They provide a scheme for “an assessment of whether the program is broadly on track and whether modifications are necessary.” They will be completed when “the Executive Board is satisfied, based on the member’s past performance and policy understandings for the future, that the program remains on track to achieve its objectives.” Of particular relevance is “the member’s observance of performance criteria, indicative targets, and structural benchmarks, and the need to safeguard Fund resources.” The issues pondered for the completion of a review have to be detailed in the arrangement. They are “expected to be held every six months, but substantial uncertainties concerning major economic trends or policy implementation may warrant more frequent monitoring.”
<i>Financing assurances reviews</i>	Where the IMF “is providing financial assistance to a member that has outstanding sovereign external payments arrears to private creditors or that, by virtue of the imposition of exchange controls, has outstanding non-sovereign external payments arrears, the Executive Board will conduct a financing assurances review to determine whether adequate safeguards remain in place for the further use of the Fund’s resources in the member’s circumstances and whether the member’s adjustment efforts are undermined by developments in creditor-debtor relations.” The periodical purchases “while such arrears remain outstanding” are “subject to the completion of a financing assurances review.” They can also be introduced where the country has outstanding arrears to official creditors.
Other variables and measures	They may be indicative targets and structural benchmarks. The principles on the scope of conditionality apply to them.
<i>Indicative targets.</i>	They may be established when they “cannot be established as performance criteria because of substantial uncertainty about economic trends”. Once the uncertainty is reduced, they become performance criteria. They may also be established “in addition to performance criteria as quantitative indicators” to assess the “progress in meeting the objectives of a program in (...) a program review.”
<i>Structural benchmarks.</i>	They are introduced “where it cannot be specified in terms that may be objectively monitored or where its non-implementation would not, by itself, warrant an interruption of purchases or disbursements under an arrangement.” They seek “to serve as clear markers in the assessment of progress in the implementation of critical structural reforms”.

<http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf> pag 4-5 visited 24/09/2007

These Guidelines of 2002 have as main trends of conditionality: (i) “the national ownership of programmes”; (ii) “parsimony in the application of the conditions”, (iii) “tailoring the programme to the member’s circumstances” and (iv) “clarity” (Buirá 2003:10; Denters 2003:13). In summary, the *raison d’être* of the conditionality would be to guarantee the repayment of loans and the implementation of free-market

frameworks (Denters 2003: 10). The Guidelines are not binding law; even if the IMF wants to reduce conditions, in some cases unnecessary structural conditions are put in the arrangement by governments to “share” the responsibility of adjustment policies (Denters 2003: 18). The Guidelines do not have a specific legal format from an international public law point of view neither; it is an orientation similar to the one a private bank would follow to confer loans, but including all the procedures for the negotiation, design and presentation of economic policies that countries have to follow. However, what seems clear is that the IMF has discretionary competences in terms of the distribution of subsidized loans and the conditionality in each arrangement (Dreher and Vaubel 2004:3). The Guidelines of 2002 were criticized because of their lack of determination in addressing socio economic effects of the arrangements and even more because they could have made explicit the duties of the ICESCR. They omitted also the creation of a “basic dispute settlement provision” proposed during years to solve all these recurrent conflicts (Denters 2003: 18-9). They were revised by the 2004-2005 conditionality review (IMF, 2005:35).

3.8.4 Compliance with IMF Arrangements

A study of 1985 reported “extremely low rates of compliance with IMF conditionality of EFF arrangements in the period 1974/84” (Haggard 1985, quoted by Dreher 2005b:3). One of the evaluations of IMF conditionality concluded that it pushed some countries, particularly in Latin America in the 1970s and 1980s, to borrow from commercial banks, letting the IMF credits as a last resort precisely to avoid conditionality (Bird 1995, quoted by Marchesi and Thomas 1997:8). However, a complete evaluation of conditionality seems almost impossible. The MONA program of the IMF, a database created to monitor IMF programs, does not allow performing a detailed analysis of conditionality because the relevance of the measures included in the conditionality is not made explicit (Dreher 2005b:5).

Since the nineties the conditionality has been focused mainly on structural conditionality. “Structural policy commitments” or “monitoring tools” used for policies implementation were particularly used during the Asian crisis but the results show a dysfunctionality of these structural conditions (Buirra 2003:16). The relation between the number of “structural policy commitments” and the program success is inversely proportional because an excess in the number of targets increases the possibilities of failure. The low rate of compliance avoids to link structural conditionality to the restoration of the external balance and the guarantee of repayment of loans, which lowered the credibility of these programs (Buirra 2003:19).

According to the survey of the IMF performed in 2001, the implementation of structural reforms is not as good as the performance on macroeconomic policies goals, in all groups of countries (table 3.6). Only in one fifth of the programs it was comparable with the macroeconomic policy area. Asian countries under structural adjustments during the crises years reported the best accomplishment, almost 90% of the total of structural reforms, although some of them with non-negligible delay. The group of non-transition economies with Stand-By and EFF arrangements²⁵⁷ reported a 63% of fully implemented reforms, 16% of non implemented and 21% of partly implemented reform programs (IMF 2001:69-70).

The accomplishment of structural benchmarks and other measures listed in the LOI does not affect directly the approval of a program or the continuation of purchases, unless they disturb the completion of a review. The first ones (structural benchmarks) were considered as important for a program's macroeconomic objectives and the second ones often included measures belonging to the government's policy agenda, which were not necessarily important for these objectives. A direct relation between conditionality and policy implementation is not clear and depends on the countries. The IMF recommended a prioritization of structural reforms, based on their importance for the macroeconomic goals, but the definition of some specific core areas remains difficult. The IMF recognizes that "some of the objectives of detailed monitoring – for example, providing technical advice on implementation – cannot be achieved outside the framework of formal conditionality" (IMF, 2001:84-5).

Precisely, a study confirmed that the compliance with conditionality has a direct relation with IMF program evaluation, particularly with reference to economic growth. Therefore, policy advice seems relevant in the results of the programs, although it is very difficult to measure. A possible measure would consist of linking the degree of advice to the number of arrangements concluded, which seems more proportional, rather than comparing it with credit volumes (Dreher 2005b:8-10). Although many studies conclude that compliance with IMF conditionality does not have a positive effect on growth, conditionality seems not to be the main responsible, because it does not seem to have a high impact on economic policies. However, the "remaining negative impact of IMF programs" has been linked to the "bad advice given by the IMF or the moral hazard that it induces to its borrowers" (Dreher and Vaubel 2004).

²⁵⁷ Colombia belongs to this category.

In general, the compliance with conditionality under IMF programs has been low, but cancellations are not a direct consequence of non-compliance and, even more, new resources have been conceded in the presence of failures (Dreher 2003: 116). In fact, the possibility to approve new programs, even if the conditions are not met has also been reported (Killick 1995, quoted by Dreher 2005b:5.) Therefore, the justification of conditionality by the need to guarantee the repayment of credit is contested by the “high failure rate of Fund Programs”, referring to the “full implementation of the program”. Even more, the growth of conditionality in the nineties has been inversely proportional with the compliance with the programs, but nevertheless the countries continued to pay their loans (Buirra 2003:8).

A recent analysis of conditionality suggested its ineffectiveness. One of the possible reasons of this failure is that conditionality has been excessive, which is deduced from its weak rates of compliance and the respective weak influence on macroeconomic policies (Bird 2001 quoted by Dreher 2008:34). These seems to be clear evidence that “if there is commitment by country authorities, conditionality is unnecessary [but] if there is no commitment, it is unhelpful”. The variety of causes of failure or success of the conditionality, makes its identification difficult. A shift from ex post conditions as actually occur, to ex ante conditionality would increase the effectiveness of programs and their ownership (Dreher 2008:35-7).

In conclusion, macroeconomic conditions are still the relevant ones for the IMF, whereas structural conditions seem to go beyond the responsibility of the IMF and therefore they are strongly controverted (Denters 2003: 17). The legal consequences of non-completion of these structural reforms, while the macroeconomic goals are totally or partially reached by other means, do not seem highly relevant for the IMF, as in the following chapters will be analyzed.

3.8.5 Colombia and the International Monetary Fund

The influence of multilateral banks on the formulation of economic policies in Colombia is and has been important, mainly because of the necessity to have access to external public credit and also because of the problems related to the generalized financial crises. After a brief presentation of the constitutional regulation of the international relations in Colombia, the formal relations between the country and the IMF are addressed, to put in a national context the conceptual developments on the normative character of IMF conditionality.

3.8.5.1 Constitutional regulation of international relations

The constitutional regulation of international relations can be summarized as follows:

- The Constitution is the supreme law; in case of incompatibility between the P.C. and the law or other regulation, the P.C. will apply (4 P.C.).
- Colombia bases its external relations on national sovereignty, respect for the self determination of peoples, and the recognition of the principles of international law approved by the country. The foreign policy will be oriented towards Latin American and Caribbean integration (P.C. 9).
- International treaties and agreements ratified by the Congress recognizing human rights and/or prohibiting their limitation have priority in the internal legal order. Constitutional rights and duties should be interpreted in accordance with those international treaties. (P.C. 93)
- The following authorities have competences in the area of international relations: (i) The Congress approves or disapproves international treaties signed by the government. The P.C. authorizes the transfer of specific competences to international organizations whose object is to promote or consolidate economic integration (P.C. 150(16)). (ii) The President is responsible for the international relations and negotiates international treaties or agreements that should then be submitted to the Congress (P.C. 189(2)). (iii) The Constitutional Court should study, in a definitive manner through the automatic public action of unconstitutionality, the constitutionality of international treaties and laws approving them. When the agreements are declared as unconstitutional, they cannot be ratified. They can be partially ratified when one or several provisions of a multilateral treaty are declared unconstitutional (P.C. 241 (10)).
- The President may give temporary effect to provisional treaties of an economic or commercial nature negotiated through international organizations. Once the treaty enters into force provisionally, it must be sent to the Congress for approval. If the Congress does not approve the treaty, its application will be suspended (P.C. 224).
- The State should promote the internationalization of political, economic, social and ecological relations on the basis of fairness, reciprocity, and the national interest. The promotion of regional integration, particularly with Latin America and the Caribbean is a priority and the creation of international organizations seeking to create a Latin American community of nations is explicitly authorized (P.C. 226-7).

3.8.5.2 The formal relations between Colombia and the IMF

Formal legal relations began in 1945 when Colombia signed the Articles of Agreement of the IMF, approved by Congress through Law 96 /1945. Both the government and the Congress, agreed on the

motivations to approve it and referred to the traditional attitude of Colombia to cooperate in the international arena, as evidenced by the approval of the United Nations Charter and the Statutes of the International Court of Justice, and to the importance to adhere to the Monetary System of Bretton Woods. Another motivation was the possibility to use IMF resources (Banco de la República, 1990:17-20). However, some critics mentioned the lack of interest of the IMF in the third world, and highlighted the recommendations of the Economic Commission for Latin America and the Caribbean (ECLAC) referring to IMF support (Banco de la República, 1990:89).

The first amendment of the Articles of the Agreement was approved through Law 2/1969 and the second amendment through Law 17/1977. The Congress and the government recommended the approval of the second amendment on the basis of the following arguments: First, the country sought to expand its transactions with the rest of the world and was entitled to an exchange rate regime adequate for this goal. Second, the approval was an act of international cooperation particularly with the United Nations. Third, the benefit for Colombia consisted also in having a growing source of (less expensive) financial resources of last resort (Banco de la República, 1990:153 -6). These three laws were all approved before the P.C. of 1991 and therefore, they were not revised by the Constitutional Court because the P.C. of 1886 did not establish the automatic procedure prior to ratification.

The third amendment was approved by Law 92/93 and revised by ruling C359/94 of the Constitutional Court. The Court argued that this amendment was **upheld** because the P.C. (226) orders the country to pursue the internationalization of its economy. In addition, it considered that signing the amendment, the State accomplished the P.C. (334 and 371), establishing the principle of intervention by the state to rationalize the economy, to improve the quality of life of citizens, and to equally distribute the opportunities and benefits of development. Finally, the competences of the Central Bank to regulate the international exchange rate and to manage the international reserves were highlighted.

The Court added that the third amendment was **convenient** for the state because the IMF provides resources to the member states to comply with the goals of the Articles of the Agreement (international monetary cooperation, expansion and balanced growth of international trade, exchange rate stability, multilateral system of payments, and attenuation of balance of payments imbalances). The amendment was highly convenient because it sought to obtain the compliance by the member states with their

economic duties. Finally, the Court observed that Colombia had always obtained cooperation for its projects when this was necessary (C359/94).

The fourth amendment approved by Law 652/2001 was revised by sentence C057/02. The Constitutional Court mentioned the political controversies concerning the IMF programs and, particularly, the lack of consideration of the particularities of each country. However, it concluded that none of these issues were relevant with respect to the approval of the fourth amendment, which was upheld based on the principles regulating international relations, particularly the sovereignty (P.C. 9), and the promotion of the internationalization of Colombian economic relations (P.C. 226).

From an economic perspective, the relation between Colombia and the IMF is directly linked to the situation and evolution of its external debt; particularly since the period 1979-82 when it jumped from 27% of GDP in 1979 to 45% in 1983. However, this rapid growth did not mean that Colombia left its condition of having relatively low debt levels in the Latin American context and in the developing world (Garay 1991:17-8). The decade of the eighties was characterized by the international debt crisis initiated in 1982 in Mexico, when multilateral organisms, central banks and economic authorities of the leading creditor countries took up a preponderant role as well as the main international commercial banks. The IMF supported countries in difficulties through the negotiation of Stand by arrangements that allowed the renegotiation of debts with commercial banks and creditor countries (Garay, 1991: 25). Colombia's IMF Country Report (consultation based on article IV of the Articles of the Agreement) of June 1984 alerted on the potential exchange rate crisis in case of an erosion of international reserves. In addition, the World Bank suspended the negotiations of a credit line until the government would take measures to correct the imbalances in the economy and until the new government would obtain the backing of the IMF for its economic policies. The main creditor commercial banks asked for the signature of a Stand-by arrangement with the IMF as a condition to negotiate new credits (Garay 1991: 29).

The case of Colombia was systematically different from the cases of other highly indebted Latin-American countries, because it did not suspend in any moment its debt service. For this reason, the government asked the international commercial banks, the World Bank, the IMF and the governments of some creditor countries, for a scheme of "surveillance" (monitoring) audited by the IMF instead of an Stand-by arrangement. This way, commercial banks would have enough warranties to provide the needed credit to

Colombia. The aim was to get an intermediate mechanism to distinguish the case of Colombia from the rest of Latin-American countries (Garay 1991: 29-30). The particular scheme showed similar parameters as those of the Stand-by arrangements but it sought to highlight the character of good debtor of Colombia and the government of the US supported this proposition (Garay 1991: 33).

The monitoring program consisted of a quarterly follow-up of a number of economic aggregates (i.e. credit to the public sector, international reserves, and external public debt). Compliance did not entitle the country to receive a credit from the IMF, because the monitoring had stricter conditions than the consultation under article IV of the Articles of the Agreement: (i) it was similar to the review of a Stand-by arrangement; (ii) the quarterly follow-up could only arithmetically verify the economic aggregates (quantitative results) without any kind of interpretation; (iii) the quarterly evaluation was complemented with two or more missions of the IMF staff per year (Garay 1991: 61-2). It was a sort of “precautionary Stand-by arrangement” in which Colombia engaged in signing a Stand-by arrangement in case of non-compliance with the goals of economic policy or, if the economy performed less favorably than expected²⁵⁸ (Garay 1991: 33).

The potential violation of the sovereignty of Colombia, considering the loss of autonomy to conduct economic policy was one of the critics to this surveillance. Besides, from the perspective of international banking practice, there were no sufficient reasons for binding conditionality imposed by the international banking system (related to the obligatory participation of the IMF in any kind of credit arrangement made by Colombia) to guarantee the payment capacity of the country (Garay 1991:44-5). However, the economic authorities agreed with the policies proposed by the IMF because such adjustment was seen as necessary. In a number of developing countries this monitoring program was negatively perceived as a precedent because commercial banks were allowed to impose conditions related to the management of national economic policy. In turn, some developed countries thought that this precedent could convert the IMF in an intermediary agent at the service of commercial banks, also intervening in the economic management of debtor countries with payment capacity (Garay 1991:62-3).²⁵⁹

²⁵⁸ However, the coffee bonanza played a central role in the adjustment process and allowed to exceed the goals of the monitoring with the IMF (Garay 1991: 23). Two sectors received a sort of “waiver” vis-à-vis the standard IMF policies: a gradual devaluation and a gradual liberalization of imports (Garay 1991: 52-3).

²⁵⁹ This situation coincided with the launch of the Baker Plan proposed by the US in 1985 to avoid a generalized moratorium of many debtor countries. The plan proposed as “Program for Sustained Growth”, recognized a more structural problem compared to the 1982 diagnostic considering that the debt problem was one of temporary illiquidity. The plan proposed some conditions for the highly indebted countries: the economic growth recovery, the fulfillment of some structural reforms and the availability of

The performance of the Colombian government was highlighted by the IMF to facilitate new credit lines for the following years (IMF 1987:19, quoted by Garay 1991:126). The results of the Colombian economy served to justify that at least one of the countries included in the Baker Plan achieved the proposed goals (Garay 1991:127-8). The next government (1986-1990) followed more or less comparable economic policies of the period of monitoring, despite the criticisms voiced during the presidential election campaign. The IMF continued to support Colombia in the following years (Garay 1991:172)²⁶⁰. The government of President Gaviria (1990-1994) accelerated and deepened the programs of “modernization of the economy”, correction of structural problems, and promotion of growth, mainly in the following sectors: foreign trade (trade liberalization), industrial policy (improvement of the infrastructure), public sector reform (public utilities, health, and transport), labor market (more flexibility to improve employment and social security restructuring), fiscal policy (more efficient tax system), exchange rate policy, foreign investment, and finally, financial system reform (Garay 1991:381-6). Those reforms served to maintain the support of the IMF and the World Bank and the access to the international financial markets (Garay 1991: 516-7).

enough financing from the multilateral banks (particularly the IMF and the World Bank) and the commercial banks through less conditions costly to restructure the debt and the multi-year rescheduling agreement (MYRA) (Garay 1991:91-3).

²⁶⁰ Economic Information Memorandum and Financing Plan, January 1989:23, quoted by Garay (1991:333).

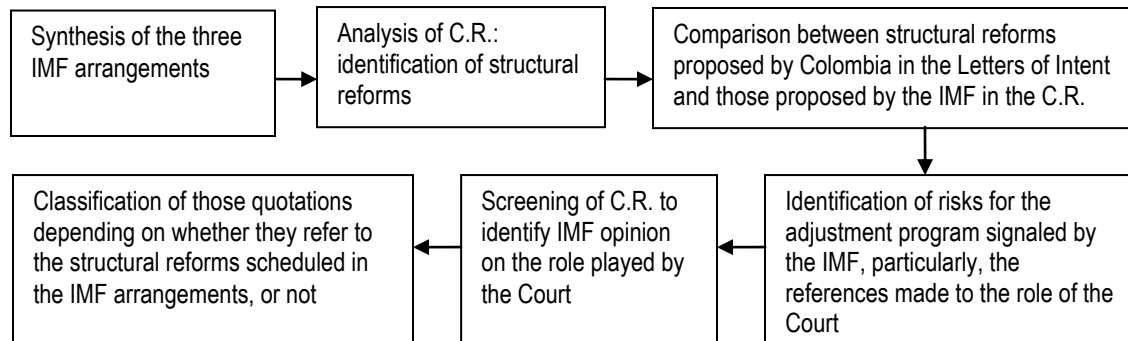
4 The Scope of Constitutional Court Adjudication in the Framework of IMF Arrangements: A Jurimetric Approach

4.1 Introduction

In this chapter, a jurimetric analysis is presented of, on the one hand, the evaluation by the IMF of the structural reforms scheduled under the adjustment programs and enforced in the period under analysis (i.e. December 1999-November 2006) and, on the other hand, related Constitutional Court case law. The aim is to present a global analysis of the structural measures arranged with the IMF, the legal reforms enacted in the sectors included in the IMF arrangements, and the constitutional case law analyzing those reforms, with the purpose to find possible links between the actions of the IMF and the Court. This global assessment covers the different dimensions of those interventions, and allows to evaluate: (i) the mutual relationship between structural reforms of the IMF arrangements and related constitutional case law; (ii) the accomplishment with structural reforms by the country; (iii) the potential incidence of constitutional rulings on the enforcement of those structural reforms; and (iv) the potential distortion that the constitutional case law may cause with respect to compliance of the IMF arrangements.

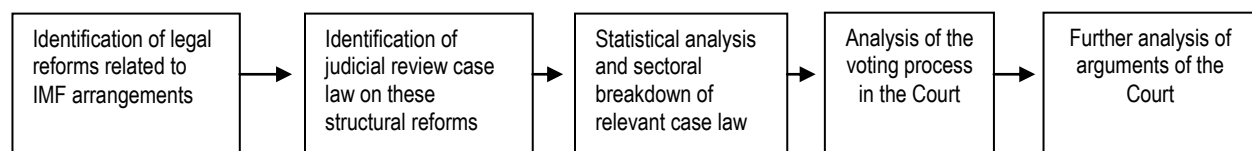
In the first part of this chapter, the IMF arrangements are taken as the point of departure for the analysis (Figure 4.1). The goals of the EFF (Dec 1999-2004) and the two Stand-by arrangements (2002-2004 and 2005- Nov.2006) are first systematically presented. Then, an analysis of the Country Reports (C.R.) produced by the IMF during the execution of those arrangements was performed to identify the structural reforms and the corresponding monitoring tools proposed by the IMF to evaluate the accomplishment of those reforms considered in the LOI and those proposed by the IMF (see chapter three). This analysis allowed a comparison between the contents of the IMF arrangements, the actions of the national regulators, and the degree of compliance with those structural reforms. Then, the risks identified by the IMF in the periodical program reviews are presented to assess the weight given by the IMF to the possible actions of the Constitutional Court. Finally, a screening of the contents of all the C.R. published by the IMF is undertaken to systematically register the quotations of Court rulings by the IMF to visualize its opinion on the role of the Court with respect to the compliance with the arrangements. These quotations were classified depending on whether they referred to structural reforms scheduled in the IMF arrangements, to past legal reforms, or to other sectors not mentioned in the arrangements.

Figure 4.1: Contents analysis of IMF Country Reports (C.R.)



In the second part of the chapter, a parallel analysis is presented of all the structural reforms with legal status enacted in the framework of IMF arrangements, and of all judicial review rulings analyzing those reforms. This is followed by a series of statistical analyses and sectoral breakdown of relevant case law, to explore the potential impact of constitutional case law on IMF arrangements. The available data on which this analysis is based are very rough; therefore, a particular effort was made to structure and classify them, to extract relevant variables to analyze the behavior of the Court. The annexes to chapter four reflect the considerable work that has been done with the data.

Figure 4.2: Analysis of Legal Reforms and Judicial Review Rulings.



This jurimetric analysis sought to identify first, from the perspective of the IMF: (i) the evaluation of structural reforms by the IMF staff, (ii) the analysis and relevance of the role of the judiciary with respect to the accomplishment of the structural reforms, performed by the IMF, (iii) the degree of accomplishment of the structural reforms, to facilitate the analysis of the potential effects of non compliance. Second, from the perspective of the Court, the analysis sought to identify: (i) the tendencies in Court rulings concerning IMF structural reforms, (ii) the potential judicial activism of the Court, and (iii) the decision-making process inside the Court. The latter refers to: (a) how consensus is reached, and which are the features and trends of dissenting or concurring votes and, (b) which are the constitutional bases of the arguments of the Court.

The picture presented in this chapter is a 'macro-view' of the behavior of the Constitutional Court and the IMF. It is complemented by a 'micro-view' that will be presented in the subsequent chapters, dealing with case law in specific sectors. Hence, sector specific questions are developed in the corresponding chapters. The analyses should allow visualizing the mutual relations between the IMF arrangements and constitutional case law; concretely, whether the Court considers those arrangements as normative parameters when it analyzes the constitutionality of structural reforms and whether its case law is a relevant obstacle to their achievement. It would also allow identifying whether structural reforms are totally or partially completed, or whether those reforms are not that important if the macroeconomic goals of the arrangements are fulfilled.

4.2 Analysis based on IMF sources

4.2.1 The Extended Fund Facilities Arrangement (Dec 1999- Dec 2002)

The structural reforms mentioned in the first LOI (December 1999), included, first, some previously achieved reforms: (i) the tax reform (Law 488/1998), (ii) the suppression of the central government's co-financing funds²⁶¹, (iii) the reduction and flexibilization of the systems of revenue earmarking (including those of the VAT), (iv) the liberalization of gasoline prices, (v) the constitutional amendment (L.A. 01/1999) to compensate in cases of public expropriations.

Second, they included a number of bills that were presented to the Congress before the conclusion of the EFF arrangement: (i) the creation of a territorial pension fund, (ii) the second generation reform of the pensions system, seeking to adapt the special pension schemes to the general regulations, (iii) the limitation of current expenditures of territorial governments, and, (iv) the constitutional amendment (L.A.01/2001) to modify the intergovernmental transfers from a system with transfers as constant proportions of current government revenue to a system with transfers that remain constant in real terms.

Third, it included some reforms that were to be implemented during the arrangement: (i) a tax reform to broaden the income tax base, to close loopholes in the VAT, and to extend the financial transactions tax (FTT) to 2002; (ii) a reform to grant additional fiscal autonomy to territorial entities; (iii) a reform of the national lottery system to obtain additional revenue for the health system; (iv) a set of structural reforms to control public spending and to focus increased expenditure on social services for vulnerable groups; (v) a

²⁶¹ They were used to provide matching grants for projects launched by territorial governments.

special program named “the social emergency fund²⁶²”; and (vi) the reduction of unemployment through a more flexible labor market and other measures as labor-intensive projects and tax incentives.

Fourth, the privatization process was a central part of the program. The scheme included: (i) the sale of several major enterprises (Specially large companies in the electricity distribution sector and a major mining company (Carbocol)); (ii) the offer for sale of the remaining public banks, except Banco Agrario; (iii) the continuation of the process of concessions in roads, railroad construction and operation, and airport facilities; (iv) the reform of the oil and mining sectors through a more flexible system of royalties, increasing private sector participation and better incentives to promote foreign direct investment.

Finally, the financial sector restructuring was also a central component of the arrangement. Previous endorsed reforms included: (i) emergency decrees (L.D. 2330-2332/1998) enacted to provide liquidity support to solvent institutions and government support to mortgage debtors, financial cooperatives, and public banks; (ii) the recapitalization of viable private financial institutions through the Deposit Insurance Fund (FOGAFIN); (iii) the liquidation of the large public sector banks and their replacement by a more efficient bank (Banco Agrario); (iv) the creation of special lines of credit under the control of the second-tier state run institutions²⁶³ with resources provided by multilateral lending institutions and other second-tier banks. The goals in this sector were: (i) to disinvest fully from all remaining public sector banks before 2001; (ii) to improve banking supervision; (iii) to raise the level of provisioning by financial institutions to international standards before 2002; (iv) to strengthen the supervisory entities (Law 510/1999); (v) to design a program of debt reduction for the mortgage sector; (vi) to manage the fiscal cost of the financial sector restructuring; and (vii) to regulate corporate sector debt, seeking to facilitate voluntary debt restructuring agreements.

4.2.2 The Stand-by Arrangement (2002-2004)

In 2002, the IMF considered that Colombian fiscal policy faced some risks despite its commitment to comply with the fiscal target for 2003. Hence, contingency measures were taken and included as part of the arrangement. These measures were: (i) a rationalization of subsidies on gasoline, diesel, and electricity; (ii)

²⁶² Resources for this program were expected from external sources.

²⁶³ They are the Instituto de Fomento Industrial (IFI) and the Banco de Comercio Exterior de Colombia (BANCOLDEX)

spending cuts; (iii) increases in current revenues scheduled for 2005; and (iv) the possibility of issuing long-term bonds on concessional terms.

Structural reforms explained in the LOI (December 2002) included: (i) a pension reform to reduce the actuarial deficit, through a referendum that would eliminate special pension regimes by 2008; (ii) public sector modernization based on the recommendations of the Fiscal Transparency Report on Standards and Codes (ROSC); draft laws were designed with technical advice from the IMF and the World Bank to flexibilize the expenditure management and to improve the efficiency and transparency of the public sector; these bills included the budget code and the gradual reduction of government workforce, trying to protect most vulnerable groups; (iii) financial sector measures including the establishment of loan-loss provisions according to Basel 2 before 2004 and the increase of autonomy of supervisors (legal defense of supervisors and full budgetary autonomy of the Superintendence of Banks before 2003); and (iv) reforms of the public health system including a plan to reach sustainable finances of the health service of the Social Security Institute (ISS); the public hospital network was expected to be financially viable by 2007 with support of a loan from the IDB.

4.2.3 The Stand-by arrangement (2005-2006)

The last of the three arrangements was requested to support “faster, sustainable and equitable economic growth through the implementation of a strong economic program” 2005-6 (LOI April 2005). First, scheduled fiscal measures included the budget law of 2006 which had to be consistent with a CPS deficit of 2 %. For this purpose, the following was planned: (i) to control spending on wages and goods and services, and (ii) to avoid the allocation of more export subsidies, considering that in 2004 they were granted for bananas and flowers to reduce their exchange rate risk; other assistance to the agricultural sector was not excluded, but within budget constraints.

Second, the structural reforms were the following: (i) the approval and implementation of the Budget Code before 2005; (ii) the deepening of the privatization process with the selling of Ecogas (the country’s natural gas pipelines operator) in 2005, and by bringing several regional electricity firms to the point of sale by 2006, (iii) a constitutional amendment before 2005 to eliminate all special pension regimes and the 14th

monthly pension payment for new pensions, and to limit the maximum pension²⁶⁴, (iv) the improvement and updating of the information on operations of all levels of government, to better coordinate monetary and fiscal policies, (v) the control of the public debt, through medium term reforms: tax policy (more efficient), subsidies (particularly on gasoline and diesel) and intergovernmental transfers.

The above synthesis visualizes the initial intentions of the arrangements, and allows comparing them with the effective outcomes of each of the arrangements. It allows also identifying whether the case of Colombia corresponds to those explained by the IMF (cf. Chap.3) in which the LOI include not only crucial and important structural reforms (needed to comply with the macroeconomic goals of the arrangements), but also other measures added by the governments and belonging to their own internal policies and priorities. All three arrangements were concluded as precautionary and therefore this may have an important incidence on the periodical evaluations.

4.2.4 Contents analysis of IMF Country Reports (C.R.)

The next step in the analysis was based on the periodical reviews presented by the IMF C.R. The method employed was the identification of all measures implying a legal reform and those expressly classified as structural reforms by the IMF although they do not involve a legal change. Measures concerning monetary, credit and exchange rate policies, even if they were included in the IMF arrangements, were not analyzed, because they are regulated by the Central Bank (Banco de la República) and their control is exercised by the Council of State and not by the Constitutional Court, given their character of administrative acts (issued by the executive power). The autonomy of the Central Bank was not considered neither because it was not analyzed by the IMF arrangements, nor was it reformed by the Congress.

A systematic classification was not easy because the IMF did not use a unique scheme. Some reforms were sometimes included in one category and sometimes in another, for example: budget law, fiscal responsibility law and privatizations. In some cases, the same measure is mentioned several times with different formulations. Aiming at a coherent scheme of analysis, several steps were followed to identify the relevant issues that can be extracted from the C.R. Considering that the central objective of the present research is to identify and analyze the relations between the IMF structural programs and the Constitutional

²⁶⁴ The actuarial deficit was calculated close to 190 percent of GDP, "partly because the constitutional court ruled against the transition rules that had been approved in December 2002. Also, the pension reserves of ISS were depleted in 2004, placing an extra burden on transfers from the central administration" (LOI 13/04/05).

Court case law, several assessments were performed. To identify the relevant actions of the IMF, a detailed screening of the C.R. was performed to register their opinions on and evaluations of the structural programs and their references to Constitutional Court intervention in the implementation of those programs. A total of 19 IMF C.R. were published during the period analyzed; 12 correspond to article IV consultation and/or periodical program reviews; four correspond to selected issues and/or the statistical appendix (00/12; 01/68; 05/162; 06/401); two correspond to reports on the observation of standards and codes (03/128; 06/356), and one corresponds to an update of the financial system stability assessment (05/287).

Table 4.1 Periodical Country Reports (C.R.) on Colombia, December 1999- November 2006

C.R.	Subject
99/149	Staff report for the 1999 article IV consultation.
00/12	Statistical appendix
01/12	First review of the extended arrangement - Staff Report
01/64	Art. IV consultation and Second review under the extended arrangement – Staff Report
01/68	Selected issues and statistical appendix (unemployment, banking, inflation, taxes, pensions)
02/15	Third Review Under the Extended Arrangement--Staff Report
03/19	Article IV Consultation and Request for Stand-by Arrangement--Staff Report
03/128	Reports on the Observance of Standards and Codes
03/181	First Review Under the Stand-by Arrangement--Staff Report
04/15	Second Review Under the Stand-by Arrangement and Request for Waiver of Performance Criteria--Staff Report
04/199	Third Review Under the Stand-by Arrangement and Request for Waiver of Non observance of Performance Criterion - Staff Report
05/154	Article IV Consultation and Fourth Review Under the Stand-by Arrangement, Requests for Waiver of Non observance of Performance Criteria and the Completion of the Fourth Review, and Request for Stand-by Arrangement--Staff Reports
05/162	Selected issues: labor markets, intergovernmental transfer, sectoral balance sheet mismatches and macroeconomic vulnerabilities, development of hedging instruments in Colombia
05/287	Financial System Stability Assessment Update, including Reports on the Observance of Standards and Codes on the following topics: Securities Regulation, Insolvency and Creditor Rights Systems, and Payment Systems; and Comments by Authorities
05/392	First Review Under the Stand-by Arrangement, Requests for Modification of Performance Criteria, and Waiver of Non observance of Performance Criteria and of Applicability of end-September Performance Criteria - Staff Report
06/234	Second Review Under the Stand-by Arrangement and Request for Rephasing of Purchases - Staff Report; Staff Supplement
06/356	Report on the Observance of Standards and Codes - Data Module; Response by the Authorities; and Detailed Assessments Using the Data Quality Assessment Framework
06/401	Selected Issues: The Fiscal Risk of Public Enterprises: Analysis of Isagen and Ecopetrol, Inflation Persistence in Colombia; Currency Risk Hedging by Colombian Corporations; Assessing Real Exchange Rate Developments
06/408	Article IV Consultation and the Third and Final Review Under Stand-by Arrangement - Staff Report

<http://www.imf.org/external/country/COL/index.htm?pn=4>

On the basis of these C.R., the first step in the analysis was to construct a comparative table with all the structural benchmarks signaled by the government in the Memorandum of Economic Policies (MEP)

included in the LOI, incorporated at the end of the periodical country reviews.²⁶⁵ However, those tables did not provide all the information about the evolution of the evaluations of structural reforms performed by the IMF; hence, a second exercise was performed: a complete screening of those C.R. containing program reviews to identify the evolution of structural reforms and their evaluation by the IMF staff. A table was drawn up to compare these results with the tables presented in the memoranda of economic policies by the government.²⁶⁶ Particular effort was made to synthesize because those program reviews are very vast and do not have a specific and systematic format; in some opportunities it was not clear whether the opinions were those of the government or those of the IMF staff. Annex 4.3 shows the resulting comparison between the reforms presented by the government in the MEP and those resulting from the screening of the C.R.

Table 4.2 synthesizes the performance measures used during the three arrangements. Prior actions were basically used in the first arrangement, which included measures of budget management, the reform of the intergovernmental transfers (re-named as Revenue Sharing System (SGP)) and pensions. All but one was accomplished with delay, and one was not met. In the third arrangement, only one prior action was included on budget management. It was supposed to be accomplished with delay (by an administrative memorandum which does not mean that the measure was effectively enforced). Structural benchmarks were the most used performance measure. In the first arrangement they referred to pensions (1), health issues (2), budget management (1), public revenue (2) and financial sector issues (reform (1) and privatization (1)). They were almost all postponed. In the second arrangement, there were three: on pensions, budget management and public procurement law. They were also postponed. In the third arrangement, they referred to the financial sector (3), budget management (2), pensions (1), and health (1), also with a poor level of accomplishment.

A performance criterion was used only for the pension reform in the first arrangement, and it was postponed. In the second arrangement, it was applied to pensions (2) (one partially accomplished and one accomplished but declared as unconstitutional), and to budget management (2) (also partially accomplished). In the third arrangement, performance criteria focused on budget management measures (3) which were partially accomplished. Finally, only once the condition for the completion of the program

²⁶⁵ i.e., C.R. 99/149, 01/12, 01/64, 02/15, 03/19, 03/181, 04/15, 04/199, 05/154, 05/392, 06/234, 06/408. Annex 4.1 presents a comparative table of the structural reform schemes proposed in these memoranda of economic policies annexed to the program reviews performed periodically by the IMF.

²⁶⁶ Annex 4.2 present this second table.

review was used for budget management measures and it was not met. In conclusion, the performance measures of structural reforms were used mainly for budgetary measures; the level of accomplishment was relatively poor, even in the category of stricter conditions.

Table 4.2 Performance measures used during the three IMF arrangements

Reforms	Accomplishment
Prior actions	
EFF arrangement	
Creation of the territorial government pension fund	accomplished with delay
Constitutional reforms of intergovernmental transfers	accomplished with delay
Law for the fiscal strengthening of sub national entities	accomplished with delay
Annual budget law for 2001 consistent with a non financial public sector deficit of at most 2.5 of GDP	accomplished with delay presented but not approved
Reform of special pension regimes	Not met
STAND-BY arrangement 2005-2006	
Plan to improve the statistical reporting system for the financing of the non financial public sector deficit	accomplished with delay ²⁶⁷
Structural benchmarks	
EFF arrangement	
Second generation pensions	Postponed
Draft fiscal responsibility law	Postponed
Territorial tax reform	Postponed
Reform of the health system under the ISS	Postponed
Reform of Law 60 regarding public education and health	Accomplished
Full disinvestment from all remaining public banks excluding Banco Agrario	Postponed
Final report of the Public Revenue commission to be made public	Postponed
Process of bringing provisioning standards of the financial institutions to international levels	Ongoing
STAND-BY arrangement 2002-2004	
Reform of special pension regimes	partially accomplished
Budget Code	Postponed
Reform of Law 80 (contract law)	Postponed
STAND-BY arrangement 2005-2006	
Budget code	Not met
Constitutional amendment to eliminate special pension regimes, end 14 th monthly pension and cap maximum pension	Accomplished
New securities law	Accomplished
Regulations to improve the quality of information reported by sub national entities	revised without legal reform
All regulations needed to implement the securities market law	Partially accomplished
Revenue sharing reform	Postponed
Law to fortify independence of financial Superintendence	Postponed
Performance criterion	
EFF arrangement	
Special pensions regime reform	Postponed
STAND-BY arrangement 2002-2004	
Budget Code	Postponed
Special pensions regime reform	Postponed
Annual budget law for 2005 according with a CPS deficit of 2 to 2½ percent of GDP	Presented ²⁶⁸

²⁶⁷ Administrative memorandum that regulated the reports of bank operations with the non-financial public sector.

and presented according to a standard international classification system	
Reform of special pension regime for the military	Done (unconstitutional)
STAND-BY arrangement 2005-2006	
Congressional approval of the Budget Code	postponed ²⁶⁹
Annual budget law /06 consistent with CPS deficit of 2.0 % of GDP	presented
Annual budget law /07 consistent with CPS deficit of 1.7 % of GDP	presented
Condition for the completion of the program review	
STAND-BY arrangement 2002-2004	
Budget Code	Not met

Source: Annex 4.3

The preceding analysis shows the relative importance attached by the IMF to sectoral reforms (according to performance measures included in the adjustment program and evaluated in the C.R. table 4.3). **Budget management** was centered on the approval of a budget code, which was first considered as a structural benchmark, then as a performance criterion, and finally as a condition for the completion of the program when the IMF conceded a waiver. Finally, it was not met. The Fiscal responsibility law was mentioned only once and the fiscal strengthening of territorial entities was the only performance measure accomplished. **Pensions** had the most performance measures accomplished, although always with delay. **Health** mentioned basically the reform of intergovernmental transfers (SGP) and the reform of the ISS. **Public revenue** was included with only two evaluation criteria for the territorial tax reform and the Public Revenue Commission; both appeared as postponed. For the **modernization of the state and transparency** the reform of the public procurement law was mentioned only once and it was postponed. For the **Financial system** several measures were mentioned but only the law on security markets was approved whereas the rest appeared as postponed.

Table 4.3 Synthesis of the IMF periodical evaluations of structural reforms

Sector/Reforms	Arrangement	Performance measure	Accomplishment
Pensions			
Creation of territorial pensions fund	I	Prior Action	Accomplished with delay
Reform of special pension regimes	I	Prior Action	Not met
	II	Structural benchmark	Partially accomplished
Second generation pension reform	I	Structural benchmark	Postponed
	I	Performance criterion	Postponed
	II	Performance criterion	Postponed
	III	Structural benchmark	Accomplished
Special pension regime of the military	II	Performance criterion	Done (unconstitutional)
Budget management			
Law for the fiscal strengthening of sub-	I	Prior Action	Accomplished with delay

²⁶⁸ This evaluation is not the same of to be approved and accomplished.

²⁶⁹ Performance criterion under the second Stand-By arrangement, and then structural benchmark.

national entities			
Annual budget law for 2001 in accordance with the non financial public sector deficit	I	Prior Action	Accomplished with delay presented but not approved
Draft fiscal responsibility law	I	Structural benchmark	Postponed
Budget Code	II	Structural benchmark	Postponed
	II	Performance Criterion	Postponed
	II	Condition for the completion of the program review	Not met
	III	Performance Criterion	Postponed
Annual budget law for 2006 in accordance with the CPS deficit	III	Performance Criterion	Presented
Annual budget law for 2007 in accordance with the CPS deficit	III	Performance Criterion	Presented
Health			
Constitutional reform of intergovernmental transfers	I	Prior Action	Accomplished with delay
Reform of the health System under the ISS	I	Structural benchmark	Postponed
Legal reform of intergovernmental transfers	I	Structural benchmark	Accomplished
New constitutional reform of intergovernmental transfers	III	Structural benchmark	Postponed
Public revenue			
Territorial tax reform	I	Structural benchmark	Postponed
Final Report on Public Revenue Commission	I	Structural benchmark	Postponed
Modernization of the State and transparency			
The improvement of the statistical reporting system for the financing of the non financial public sector deficit	I	Prior Action	Accomplished with delay
Reform of Public Procurement law	II	Structural benchmark	Postponed
Regulation to improve the quality of information reported by territorial entities	III	Structural benchmark	Revised without legal reform
Financial System			
Privatization	I	Structural benchmark	Postponed
Process of bringing provision standards of the financial institutions to international levels	I	Structural benchmark	Ongoing (no legal reform)
New securities law	III	Structural benchmark	accomplished
Rules to implement this law	III	Structural benchmark	Partially accomplished
Law to fortify the independence of the financial superintendence	III	Structural benchmark	Postponed

Second, from the quantitative analysis of the level of compliance with structural reforms, considering the framework used by the IMF to evaluate the accomplishment by member states and considering the nuance explained by the IMF (Chapter three), prior actions were the most accomplished; from a total of six, four were completed (with delay) and one was partially attained (table 4.4). Structural benchmarks were the most numerous (18) but with a very low level of accomplishment; only three measures were completed and two partially attained. They seem to be the measures closer to the governmental agenda. Performance criteria were the second most used but they were characterized by a high degree of non compliance. From eight performance criteria only one was met and three partially attained. Finally, only one condition for the

completion of a program review was included in the first Stand-By arrangement and it was not met, not even during the second Stand-By arrangement when it became a performance criterion (Annex 4.3). Taking into account that performance criteria are the monitoring tools used to control those structural reforms that the IMF considers as crucial for the macroeconomic achievements, in these arrangements only two issues belonged to this category: pensions and budget management. In the EFF only the reform of the special pensions reform was included and it was postponed. In the first Stand-by Arrangement the reform of the special pensions reform was again postponed; the reform of the pensions for the military was also included; it was approved but latter it was struck down by the Constitutional Court. The enactment of the Budget Code was included and postponed. The control of the fiscal deficit (by means of the Annual Budget Law) was included and appears as presented to the Congress although not approved. In the second Stand-by arrangement the enactment of the Budget Code was the crucial structural reform which was not met and received a waiver from the IMF. Again, the control of the fiscal deficit was a performance criterion, it appeared as presented to the Congress, although not necessarily accomplished.

Third, considering each of the arrangements individually, during the EFF only prior actions registered a satisfying level of compliance whereas structural benchmarks and performance criteria reported a very low accomplishment: only one structural benchmark was totally met. In the case of the first Stand-By arrangement, prior actions were not included and structural benchmarks and performance criteria did not report a better realization; only one performance criterion was met. It was the only program including a condition for the completion of the final review, and it was not met. Finally, the last Stand-By arrangement registered the highest level of compliance because it met the unique prior action, the two structural benchmarks and the two performance criteria. Curiously, the last adjustment program was the least necessary because it only supported the Colombian economy to return to normal relations with the IMF. It is also clear that the last one registered the best results from a macroeconomic point of view, thus it seems that the structural reform scheme lost its relevance. The fact that all of the three programs were precautionary had an incidence on the evaluation of the achievement of the structural reforms agenda performed by the IMF.

Table 4.4 Performance measures used during the three IMF arrangements: Synthesis

Monitoring measure	Number of measures	Accomplished	Partially accomplished ²⁷⁰	Not Met ²⁷¹	Other	Total accomplished
Prior Action						
EFF 1999-2002	5	3 (delay)	1	1		3
STAND-BY 2002-2004	----					---
STAND-BY 2005-2006	1	1 (delay)	0	0		1
Total	6	4	1	1		4
Structural Benchmark						
EFF 1999-2002	8	1	0	6	1 Ongoing	1
STAND-BY 2002-2004	3	0	1	2		0
STAND-BY 2005-2006	7	2	1	3	1 Revised	2
Total	18	3	2	11	2	3
Performance criteria						
EFF 1999-2002	1	0	0	1		0
STAND-BY 2002-2004	4	1 Done ²⁷²	1	2		1
STAND-BY 2005-2006	3	0	2	1		0
Total	8	1	3	4		1
Condition for the completion of the final review						
EFF 1999-2002	---					--
STAND-BY 2002-2004	1			1		0
STAND-BY 2005-2006	----					--
Total	32	8	6	17	2	

Source: Table 4.2

A next step in the analysis based on C.R., was a synthesis of the staff appraisal and evaluation of the structural program (Table 4.5). The aim was to filter the concrete opinion of the IMF during the periodical evaluations to identify the priorities concerning the structural reforms, because it has been repeatedly affirmed that countries tend to include reforms not linked with the macroeconomic adjustment program. As a consequence, the accomplishment indicated by governments does not necessarily reflect the priorities quoted by the IMF. The concrete evaluations explicitly established which reforms were prior actions, structural benchmarks, and/or performance criteria; the analysis was limited only to structural reforms and did not include macroeconomic goals.

²⁷⁰ This category includes those effectively evaluated as partially complied but also those that were registered as presented to the Congress but not approved.

²⁷¹ This term includes measures literally catalogued as not met, but also includes those qualified as postponed at the end of the arrangement and those catalogued as “pending”.

²⁷² This measure was declared as unconstitutional

The preliminary observation is that in all the periodical evaluations performed over the six years the completion of these periodical country reviews was recommended, despite the fact that some monitoring benchmarks were not achieved. In addition, all the waivers requested for the non achievement of some goals were conceded by the IMF staff. Macroeconomic performance and fiscal stability were relevant in all the periodical evaluations. Internal conflict and elections were factors considered by the IMF in the periodical evaluations of the accomplishment of structural reforms. In some cases it seems that the IMF expresses its “sympathy” (or, rejection) for the government in power. That was the case of the last evaluation of the EFF arrangement, when it highlighted the lack of efforts of the government (led by President Pastrana) to comply with the arrangement, despite the former positive periodical evaluations published by the IMF staff. In contrast, opinions concerning the government of president Uribe were in general positive despite the equally low level of accomplishment. Finally, the lack of a detailed follow-up of concrete commitments concerning structural reforms is remarkable; the IMF periodical evaluations are not very explicit and this complicates an evaluation of compliance from a legal point of view.

Table 4.5 IMF periodical evaluations

IMF Evaluation	Country Report
EFF structural reforms evaluation made structural benchmarks subject to semiannual reviews.	99/149:23; 01/64:28
The completion of the first review was recommended, based on the good performance and the commitment to the structural and macroeconomic program.	01/12: 28
- An important macroeconomic stabilization was attained ²⁷³ - Relevant structural reforms were enforced - Access to international financial markets was granted. - The Public Revenue Commission report is important to design the fiscal agenda. - Domestic events and a difficult external environment affected the recovery of the economy and obstructed the realization of some program goals, but the program advanced in an electoral period. - New challenges: the financial deterioration of the public pension and health systems and the rise in unemployment The staff recommended the completion of the third review	02/15: 21-3
- No structural benchmark was omitted. The violence against power installations affected privatization.	02/15:49
“No serious attempt was made by the previous administration to reverse the fiscal slippages, leading to pressures on the peso and a loss of access to the international financial markets. This was unfortunate, since restoration of market confidence can be a lengthy process. The new government has taken rapid and determined action since August to quicken a resolution on the internal conflict, reverse the fiscal deterioration and safeguard macroeconomic stability. Building on this, it is putting in place an economic program for the next two years designed to reinforce macroeconomic policies and reduce vulnerabilities by strengthening control over the public debt dynamics and undertaking structural reforms to help foster economic growth and enhance social services.”	03/19: 20
- Structural benchmarks of the first Stand-By arrangement would be assessed under the quarterly program review. The first review included additional fiscal measures as condition, tax package, general pension reform and the outcome of the referendum.	03/19: 18

²⁷³ Inflation was reduced; fiscal consolidation and economic management advanced.

- Special pension regime would be converted in a performance criterion. - Quarterly reviews included: a) Outcome of bills presented to Congress and in the referendum, and additional measures needed to ensure fiscal goals; b) Compromises reached on the special pension regimes reform. Some structural benchmarks would be converted into a performance criterion.	03/19: 79
Structural reforms aimed at strengthening fiscal sustainability. The presentation of a budget code was a performance criterion. The Military pensions were proposed as a structural benchmark.	03/181:4
- Financial system reform (bank supervision and mortgage sector) were highlighted; - The elimination of special pension regimes in the referendum was seen as crucial; - Restructuring ISS health system and public hospitals should result in fiscal savings ²⁷⁴ .	03/181: 35, 37-8
The completion of the first review was recommended	03/181: 19
- Macroeconomic goals advanced ²⁷⁵ - The main challenge: advance in crucial reforms to sustain the economic recovery, mainly the approval of the budget code, despite the lack of Congressional support. - Important reforms: approval of the pension reform, strengthening of fiscal decentralization, tax structure reform and privatization of banks. - The 2006 elections were catalogued as a strong obstacle to the structural reforms scheme. - All but one of the structural benchmark was observed.	04/199: 19-22
-The structural reforms agenda was catalogued as realistic, considering the political transition ²⁷⁶ . -The budget code and pensions reform were catalogued as crucial. -Due to the increase of the world oil prices, the increase of domestic prices of gasoline and diesel and the control of non-oil public spending (to save a big part of those unexpected revenues) were recommended to reduce public debt.	05/1540: 19
The staff supported the waiver for the non observance of the budget code approval.	05/392:17, 20
- Macroeconomic goals were met: Fiscal policy and inflation targeting ²⁷⁷ . - Structural reforms would continue once the new congress and government would take office: - Submission of a 2007 budget consistent with a CPS deficit was a performance criterion. - New structural benchmarks: submission of (i) the tax reform (to eliminate the FTT, and reduce the payroll taxes), (ii) the constitutional amendment to reform the intergovernmental transfers (to limit their real growth), (iii) the financial reform, to grant independence and legal immunity to supervisors, (iv) the design of a draft law to control revenue earmarking was delayed, (v) the enactment of regulations to implement the law on the securities market was modified (it would include only key regulations). - Cutting subsidies for domestic fuel prices was not considered as a specific measure. The IMF accepted the non urgency of another pension reform, despite the need to reduce the actuarial deficit	06/234:24-6
- Crucial reforms: The SGP and the tax package, because total public revenues were close to a third of GDP. Special reference to the elimination of payroll taxes. - The budget for investment was catalogued as "overly generous" and the non realization of the revenue earmarking and the reduction of budgetary rigidities was highlighted. - The board of Ecopetrol should have more independence and the subsidies for diesel and gasoline should be eliminated.	06/408:24-5
- The submission of a 2007 budget consistent with a CPS deficit (prior action) was observed. - Almost all structural benchmarks were met: (i) the submission of a tax reform, although the IMF asked to further improve the tax system (VAT rates and FTT phase out), (ii) the reform of intergovernmental transfers was submitted, (iii) enactment of rules to enforce the securities market law, (iv) partial privatization of Ecopetrol. - Pending actions: (i) draft law to strengthen the independence of the financial supervisor, (ii) the submission of the Free Trade Agreement with the US, (iii) the reduction of the revenue earmarking not mandated by the constitution was a structural benchmark which was not completed, but the government took other measures to reduce budget rigidities over time.	06/408:1,4,7-8,23-4.

²⁷⁴ The reforms of pension and social security systems were supported by the World Bank

²⁷⁵ Real economic growth was expected close to 4 %, inflation dropped, the external sector improved, and the country benefited from high world oil prices.

²⁷⁶ The IMF suggested taking advantage of the elections to advance important reforms like the tax reform.

²⁷⁷ The external current account deficit was relatively low (due to a growth in exports and despite the peso revaluation), and benefited from the conditions of the global economy.

Concerning the periodical evaluations, the growing importance of the public revenue sector should be highlighted, although concrete measures were not very explicit except for the Public Revenue Commission, but they were not considered as structural reforms neither. For social sectors as health, pensions and unemployment, there was concern about their financial viability. Budget management has predominance in the IMF analysis, with a focus on the control of the fiscal deficit and the design and implementation of the budget code. Once the enactment of the budget code received a waiver upon its non-compliance, emphasis was put on measures seeking to control revenue earmarking and, finally, simply on administrative measures. The financial sector was mentioned with less emphasis; mainly privatizations and supervision issues were analyzed and evaluated.

The third step in the analysis was to identify the risks signaled by the IMF in the periodical program reviews. From these opinions, the main variables were identified to determine whether there were clear patterns across the different program reviews or whether they were rather sporadic. The civil conflict was present in almost all the program reviews, although the intensity varied; in some reviews the IMF was more optimistic than in others, particularly in the last reviews, but it was permanently mentioned from 1999 till 2005. The political uncertainty was also a constant; the different periods of elections were a clear distortion of the structural reforms agenda. Risks of an international nature (increase of interest rates, currency depreciation, oil price stocks) appeared as a risk since 2003 and remained as such. Court activism was mentioned only once as a potential risk to the program in 2004. This has probably also to do with the political sensitivity of the matter. Other potential risks were not systematically mentioned during the seven years of the arrangements.

Table 4.6 Risks for reform program implementation according to the IMF

	99/ 149	01/ 12	03/ 19	03/ 181	04/ 15	04/ 199	05/ 154	05/ 392
Slower than expected economic recovery	X							
Civil conflict	X	X ²⁷⁸	X	X ²⁷⁹	X	X	X	
Higher than projected costs of the financial restructuring plan	X							
Strong dependence on privatizations to finance the fiscal deficit	X	X						
The centeredness of the consolidation of macroeconomic policies on structural reform	X							

²⁷⁸ It quoted that “the Plan Colombia holds out encouraging prospects” (CR 01/12:28).

²⁷⁹ The enhancement of democratic security is a cornerstone of the new Colombian government. It is a critical support of the economic program.

Uncertainties about the Congressional support for the reform agenda	X		X	X	X	X ²⁸⁰	X	X ²⁸¹
Unanticipated increase in security spending			X					
Delay of the referendum and uncertainty about its outcome				X				
Disruption in the trade with Venezuela				X	X			
The possibility of the Constitutional Court playing a more activist role in economic policy					X ²⁸²			
Vulnerability of the fiscal position due to international risks ²⁸³			X		X	X	X	X ²⁸⁴
High dependence on USA in borrowing may complicate the fiscal outlook.						X		
Faster than expected decrease of the surplus of sub-national governments.							X	
Pressures for increased public spending due to elections						X	X	

Sources: CR99/149: 16, 28; CR 01/12: 28; CR 03/19: 17; CR 03/181:5, 8, 17-19; CR 04/15:4, 14-16; CR 04/199: 3, 20-21; CR05/1540: 8, 18-19; CR 05/392: 9, 17, 20.

Finally, the fourth step in the analysis sought to tackle the central objective of the present research: a final screening was made of the totality of the published IMF C.R. (not only those containing periodical country reviews) to identify the opinion of the IMF on the role played by the Constitutional Court in the achievement of the structural reform agenda. A summary is presented in the following section.

4.2.5 IMF perception of Constitutional Court case law

Some Constitutional Court rulings mentioned the IMF arrangements when analyzing laws enacted under the structural program, e.g. when it affirmed that constitutional principles of the Legal Social State may not be ignored by those reforms (C 931/04). However, IMF C.R. also referred to some Constitutional Court rulings. In the majority of the cases, these rulings were quoted as actual or potential distortions to adjustment policies; only once the IMF considered that “economic and financial policies are conducted in a transparent and non-discriminatory manner”, adding that the existence of control institutions and the revision by courts of economic regulations, which are “sometimes overturned”, are positive for building institutional confidence towards the state (CR 99/149:24). The first quotation referring to rulings affecting economic policies was in 2001; and the IMF clarified that those opinions did not necessarily reflect the opinion of the government. These reforms referred to social security, state restructuring, public wages and

²⁸⁰ The political agenda is monopolized by the campaign for a constitutional amendment to authorize the reelection of the President and therefore, key reforms are in danger and extra public spending is expected (CR 04/199:3).

²⁸¹ Structural fiscal reform program should resume as soon as politically feasible; the IMF asked to prepare reforms to be followed by the next government (CR 05/392:20).

²⁸² I.e. it could reverse some of the government’s economic policies (CR 04/15:4 and 14-16).

²⁸³ E.g. financial market access, temporary loss of export markets and volatility in external markets (interest rate increases, currency depreciations, oil price stocks).

²⁸⁴ The gain in net international reserves since 2003 was protecting economic performance (CR 05/392:9). For the IMF a drop in the world price of oil could produce a moderate rise in public debt compared with the baseline (CR 05/392:17).

the mortgages sector; only the last two rulings alluded to the national development plan and public wage increases that may affect economic reforms enacted under the arrangements (table 4.7).

Table 4.7 Constitutional Court rulings quoted in CR 01/64

Sentence	Law challenged	IMF opinion
C579/96	L100/93 (235)	It increased the labor costs of the ISS in spite of its concurrence with the private sector in health services provision
C173/96	L100/93. (279)	It increased the annual pension charges (see Clavijo 2004b)
C 702/99	L489/98.	It avoided the executive branch to close public institutions.
C747/99	D. 663/93	It criticized the interest rate for housing (see Kalmanovitz 2003a)
C122/99	D. 2330/98.	It ordered that the program for mortgage debt reduction must be applied to debtors in arrears.
C136/99	D. 2331/98.	It authorized that the surrender of their creditor's properties imply the liquidation of any mortgage duty
C 700/99	D. 663/93	It puts limits to the mortgages interest rate
C 432/00	L344/96 (21)	It struck down the reductions of transfers to a subsidized health plan for "people outside of the market" ²⁸⁵
C557/00	L 508/99.	It struck down the National Investment Plan, part of the National Development Plan. Many projects were therefore frozen.
C1403/00	D. 955/00.	
C1433/00	L 547/99.	It ordered the compensation for inflation of public wage increases.

Source: CR 01/68 12-3.

This C.R. referred also to C740/99 analyzing Law 488/98 (28) which approved a tax package accused of complicating the tax administration²⁸⁶; in this case, the IMF agreed with the declaratory of unconstitutionality (CR 01/68:64). C815/99 analyzing Law 278/96 (8) was also quoted. This conditioned ruling ordered that the minimum wage increase should compensate for past inflation; this was seen by IMF as a reversal of the efforts to limit the incidence of backward-looking wage indexation (CR 99/149:22); some years later the IMF reiterated that the labor reform did not solve the effects of this ruling that indexed minimum wages and created a high budgetary cost (CR 03/19:15).

The mortgage sector was the protagonist in the discussions between lawyers and economic regulators at the end of the nineties. Many criticisms of the constitutional case law were based on rulings referring to this sector. It was not chosen as case study in this research, because those regulations and their respective Court analysis were realized mainly before the start of the IMF arrangements (1998-9). Most of the measures referring to this sector that were included in these arrangements were enacted by the executive

²⁸⁵ This law referred to public expenditure control but as it was enacted before the analyzed period.

²⁸⁶ The criticism was centered on the system of presumptive taxation for small and medium taxpayers (simplified regime) that required the administration to calculate and issue tax assessments to all tax payers in the system.

and, therefore, escaped the control of the Constitutional Court. Notwithstanding that they were not part of the structural agenda, some C.R. continued to refer to them:

Table 4.8: Constitutional Court rulings concerning the mortgage sector, quoted by the IMF

Ruling	Law	IMF opinion	Country Report
C700/99	D 663/93	It “put a cap on mortgage rates”; hence, a partial insurance scheme was created to protect against interest rate risk increase.	01/64:7
C747/99	D663/93 (121)	It linked the indexation of interest rates of mortgage debts to past inflation and forbid the capitalization of interest, as an answer to accusations of creditor abuses.	01/68:26
C955/00	546/99 (3)	It limited interest rates on mortgage debts by the “central bank at the lowest rate in the market”.	01/68:26
C122/99	D 2330/98	“(S)everal judicial and regulatory decisions discouraged banks from offering mortgages”. The Court ordered during the 1999 crisis “a retroactive change in the indexation formula used in mortgages, leading to a significant decline in the outstanding value of mortgages. In addition, the court set a limit on the real interest rate on most mortgages. Moreover, completing a foreclosure often takes up to 5 years” (...) “(d)ecisions intended to protect borrowers are actually making it more difficult for borrowers to acquire housing.”	05/15413, 14, 16
C 700/99	D. 663/93		
		Mortgage lenders may still be affected by legal risks, because Law 546/99 created rigidities and affected particularly lower-income borrowers. Housing policies should reduce “the housing deficit” also caused by the “constitutional court’s interest rate ceilings”. Together with restructuring tax subsidies for mortgage lending would cut benefits to wealthy households. This would grant subsidies to low-income households and it would eliminate restrictions of “Social Priority Housing lending”.	05/287:18

Other opinions related to the use of the broad mandate by the Court to rule on economic policies. Particularly three rulings were highlighted: when part of the VAT increase was nullified (C776/03²⁸⁷), when an increase of public wages was ordered (C1017/03), and when the 2002 pension reform that shortened the transition period for the pension regime adopted in 1994 was partially struck down (C1056/03). This ruling was qualified as responsible for the increase by 17 percent of GDP of the actuarial deficit of the pension system (CR 05/1540:7-8). The IMF qualified the Court as activist and a risk for the structural reform agenda, clarifying that the risk consisted of the possibility to reverse some of the government’s economic policies (CR04/15:4 and 14-6). The Colombian Executive Director at the IMF stated in the final C.R. that “the results have been underpinned by a wide range of structural reforms. In some instances either Congress or the Courts failed to support or to uphold those efforts” (CR 06/408 1-4). A screening of all the C.R. published by the IMF during the period of the arrangements allowed identifying those judicial review rulings referring to structural reforms quoted by the IMF. They concerned basically public sector

²⁸⁷ An analysis of this ruling from the perspective of the Legal Social State was realized by Alviar (2009).

wage increases (50% of the quotations), pension reforms (C1056/03), tax concerns (C776/03) and the referendum. Table 4.9 presents the rulings quoted explicitly.

Table 4.9 Constitutional case law quoted by the IMF as disturbing the structural reform agenda

Ruling	Law	IMF comment	Country Report
C1433/00	547/99	It ordered “wage increases corresponding to the previous year’s inflation” and “future wage increases must, at a minimum compensate for inflation in the preceding year”. The fiscal adjustment was affected by the cost of this decision.	01/64:3, 7
C1064/01	628/00	It modified partially C1433/00. This ruling and the decline of domestic interest rates eased fiscal management.	02/15:8
		Based on this ruling, the budget law of 2002 allowed keeping “most spending at levels consistent with the freeze until the vote on the referendum”. Hence, a decree to keep the freeze on public wages was enacted.	03/181:9, 11
C551/03	796/03	The Court was accused to delay the referendum process.	03/181:42
C776/03	788/02	The Congress and the Court were an obstacle to the implementation of the structural reforms; the last one “used its broad mandate to rule on economic policies.” This ruling nullified part of the VAT increase approved in 2002	05/1540:7-8.
C1017/03	780/02	It “ruled that public wages had to rise by at least half the rate of inflation, making it impossible to carry out the contingency plan”, i.e. “the decree to freeze government wages above a certain threshold”; therefore, the deficit of the Central Public Sector (CPS) was not kept in line with the program target.	04/15:10
		This ruling would rise current spending	04/199:10
C1056/03	797/03	A bill was presented to correct this ruling related to the 2002 pension reform.	04/15:41
		“(In) 2004 the court nullified part of the 2002 pension reform (the shortening of the transition period to the new pension regime adopted in 1994), (...) it “raised the actuarial deficit of the pension system by 17 percent of GDP”	05/1540:7-8
		It ruled against the transition rules approved in the pension reforms. As a result, “the actuarial deficit stayed at almost 190 percent of GDP and pension reserves of ISS were drastically reduced in 2004, creating extra costs for the central administration”. The congressional approval of the bill by June 2005 was asked.	05/1540:50 MEP.

Some C.R. expressly referred to the role of the Court when analyzing some reforms not included in the structural adjustment but that may have had an influence on it; this was the case of the competence of the Court to review the constitutional amendment permitting the re-election of presidents (CR05/1540:8). In the opinion of the IMF, this uncertainty limited the room for maneuver of the government in Congress (C.R. 05/392:5).

APFR case law also had an influence on the IMF supported programs because of its generalized effects on budget management; particularly, cases when the Court ordered new expenditure not included in the law. Notwithstanding, neither the IMF nor the government analyzed those rulings and their consequences.²⁸⁸ Only in one opportunity the IMF highlighted that the Court had been actively ruling with direct

²⁸⁸ APFR rulings ordering the accomplishment of the law were not considered, because they did not show judicial activism.

consequences for the budget. According to the IMF, “the gains in poverty reduction have been eroded in the past 2 years due to the economic downturn and the intensification of the internal conflict. The number of internally displaced persons in need of public assistance was about one million. The pressure on public and private resources was due also to the earthquake that affected the coffee producing region in 1999” (CR 99/149:24). ESC rights were thus ignored despite the fact that they involved sectors considered as crucial in the adjustment program (i.e. social security system, wages) and despite the role played by APFR rulings in the budget programming.

4.3 Analysis of legal reforms

Turning now to the legal reforms, they were considered here if they were enacted during the observed period and if they were directly related to the economic sectors included in the IMF structural reforms. The aim was to perform a comparative analysis of the structural reform agenda and the reforms effectively advanced by the Congress. Taking the structural reform commitments as the point of departure, a screening of the entire legal production by Congress or by government (when it had legislative competences) was undertaken.²⁸⁹ The former category includes regular laws (L) and constitutional amendments (Acto Legislativo –AL-). The latter category includes legislative decrees (*Decretos legislativos*, P.C. (212-4) - DL-) and decrees with status of law (*Decretos con fuerza de ley*, P.C. (150 (10) -D-). The first ones are enacted by the President under constitutional powers during a state of siege (*conmoción interior*); they are used to solve unexpected public order or socio economic emergencies and are subject to *ex-officio* control by the Constitutional Court. The second ones are enacted when legislative competences are conferred to the President for regulating specific matters within the limits established by a “Frame Law” (*Ley Marco*). They provide general regulations concerning objectives and criteria that the government has to follow when regulating the sectors mentioned in the P.C. (150 (19). These rules were selected and grouped by topic according to the policy areas mentioned in the IMF arrangements.

As a result of the screening process, table 4.10 gives an overview of the reforms per year and per policy area, measured on the basis of the number of enacted laws. The major legislative work was done in 2003 (21%) followed by 2002 (16%). The peak observed in 2003 coincided with the first year of a new political cycle after the 2002 presidential elections. The less productive years, without counting 1999 in which the first arrangement was signed only in December, were 2004 and 2006, both accounting for 6% of the total

²⁸⁹ Other administrative decrees were not considered because their control is exercised by the Council of State.

legal production during the analyzed period. These years have in common that they were the last years of the Stand-by arrangements. The most represented sector is budget management (33%), followed by fiscal revenue (22%). The restructuring of the financial system and the intervention in the private sector were the least represented, each one with a participation of 5%. Also for fiscal revenue and budget management, 2002 and 2003 were the most important years, thus following the general trend.

Table 4.10 Reforms related to the IMF arrangements, by policy area.

Sector	EFF				Stand-By		Stand-By		Total	%
	1999	2000	2001	2002	2003	2004	2005	2006		
Fiscal revenue	-	3	2	4	4	1	1	2	17	22%
Budget Management	3	4	1	5	6	3	2	1	25	33%
Modernization of the State	-	1	-	1	-	-	1	2	5	7%
Restructuring the Financial sector	1	-	-	1	-	-	1	1	4	5%
Transparency of the public sector	-	2	2	-	3	1	-	-	8	11%
Intervention in private sectors	-	1	-	1	-	1	1	-	4	5%
Pensions	1	-	2	-	3	1	1	-	8	11%
Health sector	-	-	3	-	-	-	1	1	5	7%
Total per year	5	11	10	12	16	7	8	7	76	100
Percentage	6%	14%	13%	16%	21%	9%	11%	9%	100	

Source: www.secretariassenado.gov.co and annex 4.5

4.4 Analysis of Constitutional Court case law 2000-2006

Having identified the legal reforms enacted in the framework of, or at least, related to the IMF arrangements, a jurimetric analysis was applied to Constitutional Court case law for the 2000-6²⁹⁰ period, which totaled 9118 sentences, of which 27 percent corresponded to constitutional adjudication (judicial review) and 73 percent were APFR sentences (table 4.11).

Table 4.11 Constitutional rulings: constitutional adjudication (judicial review) and APFR

Total number of sentences	1758	1346	1121	1233	1249	1331	1089	9118
APFR	77%	73%	69%	72%	72%	75%	77%	74%
Constitutional adjudication	23%	27%	31%	28%	28%	25%	23%	26%

Source: www.ramajudicial.gov.co

The sentences considered were those deciding judicial review cases, because structural reforms were challenged through this action. As it has been explained, APFR case law, which represents more than 70% of the total number of sentences and which influenced also public policies with budgetary implications, were

²⁹⁰ From 1999 only the legal reforms presented by the Government under the EFF were selected because the arrangement was only signed on 19 December 1999.

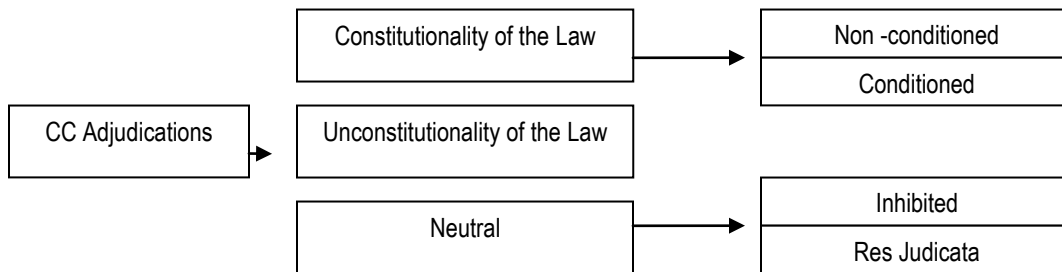
considered in specific relevant sectors involving the supply of social services involving ESC rights (i.e. health and public wages).

The first selection (sentences analyzing structural reforms) served as point of departure for the quantification of constitutional case law. These sentences were classified by type of decision: deciding the constitutionality, the unconstitutionality or conditioned the constitutionality of some article (s) or part of an article of the statutes. Each sentence can theoretically contain more than one decision (ruling or adjudication).²⁹¹ This means that the total number of decisions largely exceeds the total number of sentences. Annex 4.5 based on the extensive and detailed annex 4.4, shows all the decisions taken in each sentence of the Constitutional Court concerning each one of the reforms with legal status adopted by Congress or by Government under the Structural Adjustment Arrangements (1999-2006). For statistical purposes, Court decisions concerning decrees with legal status enacted under specific competences given by a “Frame Law” were attached to those concerning that law.

In view of developing an in depth statistical analysis, rulings identified in the selected sentences were classified in four categories: those declaring the constitutionality of the reforms, their unconstitutionality, their conditioned constitutionality and neutral rulings (including inhibited and *res judicata* adjudications). Adjudications declaring the constitutionality, and unconstitutionality of a reform were counted once by sentence even if they include several articles. An adjudication on the whole text of a statute (for procedural aspects, for instance) is counted as a single decision. “Neutral” decisions are produced when a statute (or part of its articles) was analyzed by the same arguments before (*res judicata*), or when it cannot be analyzed for different reasons, the most common one being that the challenge was not correctly presented (inhibited decision). Although, from a different perspective the latter decisions cannot necessarily be called as “neutral”, for this research they were categorized as such because they do not change the structural reforms enacted under the IMF arrangements. They were counted in a separate column, and as in other cases, they were counted once even if they include more than one article. Adjudications declaring the conditioned constitutionality of a reform are not based on constitutional competences defined in the P.C. (241) but on the practice of other constitutional courts (e.g. using the “severability clause”) (Palacios 2001b). Its measurement sought to define to what extent the Court has been acting as a sort of legislator through discretionary (arbitrary?) rulings. They were counted as in the other cases.

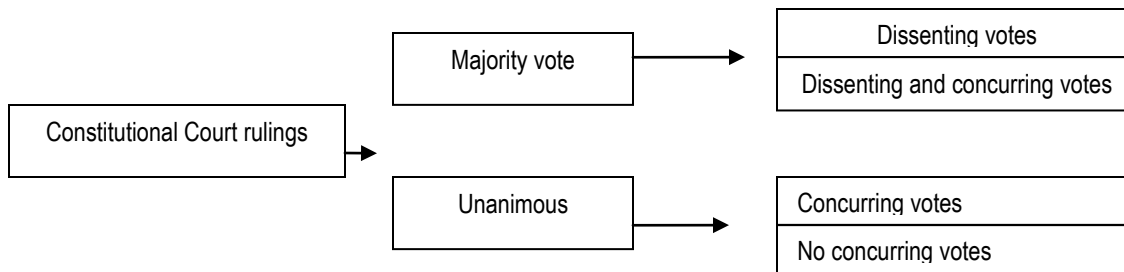
²⁹¹ Those terms are used here as synonyms

Figure 4.3 Typology of Constitutional adjudications



Information on minority opinions in the voting processes was also included when adjudications were adopted by majority. Justices may express their disagreement by notifying “dissenting votes” (salvamento de voto) or may present opinions in which they clarify their different or complementary arguments not shared by the majority²⁹² of the Court through their “concurring votes” (aclaración de voto). Dissenting votes (D.V.) and concurring votes (C.V.) were counted by sentence; when a sentence was voted without unanimity, the number of D.V. or C.V. for each sentence was specified in Annex 4.4 Annex 4.5 include a column with the number of sentences analyzing the corresponding law and which were not unanimous.

Figure 4.4 Typology of the Constitutional adjudication with respect to the voting process



4.4.1 Sectoral breakdown of Constitutional Court adjudication

Non-neutral decisions by policy area were explored to continue the in-depth analysis and identify those sectors with higher numbers of sentences (suggesting a more controversial character from the perspective of the citizens due to the number of challenges) and those laws that were the most reversed by the Court (suggesting a more controversial character from the perspective of the judiciary). This quantification also sought to select specific rulings for case studies. Decisions here referred to as “non-neutral” may change

²⁹² For further analysis see Mejía and Rivas (1997).

the effects of the reforms when they strike down a law totally or partially, or when they condition its application. The voting process was also presented to evaluate the degree of controversy in the decision making process in the Court; hence, they imply a controversy inside the judiciary. For each policy sector, a summary of sentences containing “non-neutral” decisions was presented to identify some trends in the judicial decisions inside each sector and to highlight the most analyzed topics by the Court and the orientation of these decisions. In the analysis of the arguments of the Court, other issues were raised, for instance, whether formal charges (based on procedural failures) were accepted more under specific topics than under others.

4.4.1.1 Fiscal Revenue

This sector was largely quoted and analyzed by the IMF. First, the Financial Transaction Tax (FTT) was mentioned from C.R. 99/149 onwards. In C.R 01/12 the bill, seeking to make this tax permanent, was presented against the advice of the IMF. C.R 01/64 and 01/68 analyzed the FTT and C.R 02/15 proposed the inclusion of some exemptions to the tax. C.R 03/19 presented again the opinion of the IMF against the tax. In C.R 04/15 the IMF did not agree with the tax increase because of the effects on the financial sector. C.R 05/1540 included the conclusions of the FSSA (Financial System Stability Assessment) against this tax. In C.R 06/234 the IMF recommended its reduction and in C.R 06/408 the IMF recommended to phase out this tax. Despite the reiterative opposition of the IMF to this tax, Law 633/00 established it as permanent and created exemptions for the compulsory social housing fund. 30% of the total number of non-neutral rulings (18% declaring the unconstitutionality and 9% conditioning the constitutionality; see table 4.12) in this sector corresponded to this statute. C.R. 01/68 qualified this statute as a strong but distortionary package.

The FAD (Fiscal Affairs Department) assistance to the country was constant during the arrangements. In C.R 99/149 and C.R 01/12 a tax package was proposed and in C.R 01/64 the IMF reported that the government strengthened the tax proposal. In C.R 02/15 the IMF advised on the problems related to the decrease in tax revenue. C.R 03/19 referred to Law 788/02 which established the wealth tax (to protect democratic security) as a permanent tax and reformed other taxes. For the IMF, this tax package provided a modest broadening of the national tax base. Law 788/02 had 31% of the total number of non-neutral rulings; 21% declaring the unconstitutionality and 6% conditioning the constitutionality. Sentences relating to the wealth tax and enacted as a result of the automatic control of DL 1838/02 and DL1885/02 (that

created the wealth tax in exceptional circumstances) were brought together. In these sentences two rulings struck down some rules, one conditioned their constitutionality and two upheld it. The creation of the wealth tax as a permanent tax was mentioned in C.R 03/19 and in C.R 06/234 a bill was mentioned to retain it.

C.R 03/19 mentioned also measures to raise special VAT rates to the standard rates, to increase income tax by phasing out exemptions and to propose measures against tax evasion. These were structural benchmarks in C.R 03/19, despite that this statute was enacted before signing the first Stand-by arrangement. The IMF recommended the reduction of VAT rate dispersion and in C.R 03/181 a VAT increase was part of the contingency plan in case the referendum was not approved. However, Law 788/02 established that the reform of the VAT would start in 2005, without linking it to the results of the referendum. Curiously, in C.R 04/15 and C.R 04/199 the IMF observed that the tax revenue was affected because of the latter implementation of VAT approved in 2002.

The only ruling specifically mentioned by the IMF as perturbing the structural reform program was C776/03 which struck down Law 788/02 (116) which enlarged the basis of the VAT, including essential consumption goods. The reason for unconstitutionality was the violation of the principles of progressiveness and equity in tax issues (363 P.C.). Other reasons were a) the lack of a “large” participation, because the Congress did not invite enough members of civil society to discuss the tax reform; b) certain goods were excluded or exempted from the TVA to preserve the real equality of the Legal Social State (1, 13 P.C.); c) direct taxes had serious failures in their collection; d) at the level of public expenditures, no compensation was presented and even more, social expenditure was diminishing over the last years; e) This VAT was earmarked for security and defense (not established by the law)); f) the tax ignored the right to the vital minimum, and the duty to contribute to financing state expenditures, respecting the principles of justice and equity (95 (9) P.C.).

The Public Revenue Commission was mentioned in C.R 01/64 and in C.R 02/15 its report was considered as a structural benchmark and crucial for the public finances and the macroeconomic stabilization of the country; however those recommendations of the Public Revenue Commission were not implemented.

During the analyzed period, 17 legal reforms were enacted in this sector; 12 of them referring to tax reforms and five referring to the non-renewable resource regime. 123 judicial review sentences decided challenges

against these reforms. Sentences referring to Legislative Decrees enacted under the State of Siege (Conmoción Interior) correspond to an automatic control of the whole decree. From all the sentences of this sector, 172 rulings were identified; 17% ruled the unconstitutionality and 10% conditioned the constitutionality of some reforms. Unanimous sentences (without D.V. or C.V.) were the majority (82%) of the total number of sentences. Only 22 sentences with D.V. referring to tax reforms were counted.

Rulings referring to Law 633/00, Law 788/02 and Law 863/03 were the majority and they were mostly unanimous (84%, 79%, and 83% respectively). Other tax reforms (Law 608/00, Law 677/01, Law 818/03, 939/04, 1004/05) related mainly to tax incentives; together they were only four times challenged (four sentences) with five rulings of which only one struck down some articles. The tax reform enacted in Law 1111/06 could not be evaluated because it was enacted in December and, therefore, the potential challenges fell outside the analyzed period. The same occurred with Law 1099/06 which extended the validity of an article of Law 633/00.

However, for the IMF a more ambitious reform was needed and C.R 04/199 included as structural benchmark the advice of the IMF to introduce a reform before the electoral campaign of 2006. C.R 05/1540 informed about the strong political resistance to this reform and C.R 05/392 took note of its rejection by the Congress. In C.R 06/234 it was again included as a structural benchmark and the presentation of a bill was registered. The same was included in C.R 06/408. Another non realized reform proposed in the periodical C.R was the Territorial Tax Reform, mentioned by C.R 01/12 and C.R 01/64 and included as structural benchmark in C.R 02/15. It was delayed due to the elections; this reform was mentioned last in C.R 03/19.

The remaining laws referred to mining, natural resources and the regulation of royalties. Six legal reforms referred to these issues (L619/00, L685/01, L756/02, L858/03, L859/03 and L939/04). Together they were analyzed in 18 sentences with 31 rulings, four of them struck down partially or totally the statutes and seven conditioned the constitutionality of some rules. In this sector, unanimous decisions were the majority: 17 (94%). The reforms related to non-renewable resources were practically not mentioned by the IMF, except for the reform of the Public Oil Enterprise (Ecopetrol) and the need to eliminate fuel subsidies (cf. analysis of IMF arrangements). This situation contrasts with the relevance given to the revenues derived from oil exports, mainly because it significantly helped in the realization of the macroeconomic goals of the IMF arrangements. These topics were not developed by the law nor analyzed by the Constitutional Court

Table 4.12: Non-neutral decisions related to Fiscal Revenue

Law	Total number of sentences	Total number of rulings	Rulings of constitutionality	Rulings of conditioned constitutionality	Ruling of unconstitutionality	Neutral decisions	Sentences with concurring votes	Sentences with dissenting votes	Unanimous sentences
L 608/00	1	1	1	0	0	0	0	0	1
L 619/00	5	5	0	0	1	4	2	1	4
L 633/00	37	51	20	5	9	18	7	6	31
L 677/01 ²⁹³	1	1	1	0	0	0	1	0	1
L 685/01	9	20	7	5	3	5	1	0	9
L 756/02	4	6	2	2	0	2	1	0	4
DL 1838/02	1	3	1	1	1	0	1	1	0
DL1885/02	1	2	1	0	1	0	0	1	0
L 788/02	39	53	19	3	11	20	9	8	31
L 818/03	2	3	1	0	1	1	1	1	1
L 858/03	0	0	0	0	0	0	0	0	0
L 859/03	0	0	0	0	0	0	0	0	0
L 863/03	23	27	10	1	3	13	2	4	19
L 939/04	0	0	0	0	0	0	0	0	0
L1004/05	0	0	0	0	0	0	0	0	0
L1099/06	0	0	0	0	0	0	0	0	0
L1111/06	0	0	0	0	0	0	0	0	0
Total	123	172	63	17	29	63	25	22	101

Source: Annex 4.5

4.4.1.2 Budget Management

In the areas of public expenditure and public debt, 25 statutes were voted leading to 104 sentences of the Constitutional Court, containing 156 rulings analyzing the statutes. 21% decisions struck down partially or totally a statute whereas 10% conditioned their application. Together they represented less than the total number of constitutional adjudications and less than the number of neutral decisions which represented each of them 35%. Unanimous sentences represented 66% of the total number of sentences.

The need for fiscal adjustment of territorial entities was a prior action in C.R. 99/149. C.R. 01/12 and 01/64 mentioned its necessity and C.R. 02/15 highlighted the enactment of Law 617/00 (fiscal adjustment at the sub national level) which was the most challenged statute in the sector, representing 27% of the total number of sentences. Law 550/99 (Economic intervention to support private and public corporate sector in crisis) represented 18% of the cases. Together, Law 617/00 and 550/99 were the framework for the

²⁹³ Law 677/01 regulates special economic export zones. As it contains tax incentives it was counted as a tax reform.

management of the fiscal restructuring during the crisis of 1999-2000, both in the public and private sectors. Rulings striking down parts of these statutes represented 25% of the total rulings in the sector whereas conditioned rulings represented 17%. However, they provoked a different behavior in the decision making process inside the Court. Almost 90% of the sentences referring to Law 550/99 were unanimous, whereas only 68% of the sentences analyzing Law 617/00 were unanimous. Law 922/04 prorogated Law 550/99 but until 2006 it was not challenged.

Law 508/99 which enacted the National Development Plan for the Pastrana government, was totally struck down (C557/00) for procedural reasons that could not be corrected under the terms provided by the P.C. (341). This sentence was criticized by the IMF and accused of obstructing public investment programs, because it froze “the execution of a number of projects in the areas of agriculture, education and housing until the procedural issues were resolved” (C.R 01/68:13). However, this statute was enacted before the start of IMF arrangements, and those sectors were not the focus of the programs. D 955/00 which included the National Investment Plan as part of the National Development Plan 1998-2002, was struck down by C557/00. The government enacted it, based on constitutional competences (P.C. 341). It was again totally struck down because the presented situation did not correspond to the hypothesis described in the P.C. (341) and, therefore, the government could not enact the National Development Plan by Decree (C1403/00). The Pastrana government was thus left without National Investment Plan. This did not cause important traumatizations because this law may be modified by the Annual Budget Laws which do have a compulsory character for the budgetary execution (P.C. 341-51). The National Development Plan of president Uribe (2002-6) was enacted by Law 812/03, and analyzed by 19% of the total number of sentences of the sector, which were mainly unanimous (55%). 31% of the rulings declared the partial unconstitutionality and only one conditioned the constitutionality. The periodical C.R. did not focus on the National Development Plan.

Although staff reduction should be decided by the President, it is reflected in the annual budget laws. This issue was present in almost all the periodical C.R.: In C.R. 99/149 a wage increase below the projected inflation was a prior action. In C.R. 01/64, C1433/00 was accused of distorting public policy of budgetary control. C.R. 03/19 and C.R. 03/181 proposed the adjustment of wages to the annual budget law availabilities. In C.R. 04/15 the enactment of a decree to freeze public wages above a threshold was presented as a contingency plan for the non approval of the referendum. C.R.04/99 presented C1017/03 as

responsible for the increase of public wages. By contrast, C.R. 05/1540 declared that the wage bill remained stable with respect to the GDP. Annual Budget Laws of the period (L547/99, L628/00, L780/02 and L848/03) were challenged mainly because of the partial or total freeze of public wages. These sentences deciding on the annual indexation of public wages were more controversial for the IMF. All of them gave compulsory orders to the government to adapt the budget to the rulings. All of them were also highly controversial inside the Constitutional Court (See chapter 6).

Concerning the reform of the Organic Budget Law (OBL), in C.R. 03/19 the assistance of the IMF and the World Bank were requested to design this reform. C.R. 03/181 established the enactment of the Budget Code as a performance criterion but surprisingly C.R. 04/15 highlighted that the Budget Code enactment was delayed. However, the IMF asked that the annual budget law of 2005 should be according to the international classification system. C.R. 04/99 included the Budget Code as a condition to complete the program review, which was not met and the IMF conceded a waiver. As a performance criterion was included that the annual budget law had to be approved according to international standards. C.R. 05/1540 established as performance criteria alternative ways to enhance budget flexibility and that the annual budget law of 2006 could be prepared under the guidelines of the new code. C.R. 06/234 established as structural benchmark the presentation of a bill to approve a Budget Code and in C.R. 06/408 the IMF qualified it as an unsatisfactory task.

These budgetary issues (Annual budget laws and OBL reform) represented 60% of the total number of legal reforms (15 out of the 25 reforms). Sentences analyzing them represented together 30% of the total number of sentences. 26% of the rulings declared the unconstitutionality and 15% conditioned the constitutionality of some rules. The unanimity reached 61%. Law 819/03 (Fiscal responsibility law²⁹⁴) was presented as a structural benchmark in C.R. 01/12. C.R. 01/64 included FAD assistance on this issue as a structural benchmark and in C.R. 02/15 this structural benchmark was postponed. In C.R. 03/19 it was again mentioned and in C.R. 04/15 its approval was registered. This statute was twice challenged with one non-unanimous ruling of unconstitutionality. Law 644/01, regulating the setting of wages of legislators, was challenged only once with one ruling declaring the partial unconstitutionality by unanimity (see chapter six).

²⁹⁴ The C.R. classified this reform in the sector of transparency, but thematically it corresponds to the OBL.

The presentation of the referendum (Law 796/03) was a structural benchmark in C.R. 03/19. This law contained measures to freeze some current expenditures, among them, public wages and pensions (Chapter six). The IMF criticized the Constitutional Court for “delaying” the ruling on the constitutionality of this referendum (CR 181/03:42). This law had automatic control by the Court who declared the partial unconstitutionality of the referendum (not unanimously). The referendum did not obtain enough votes to pass and as a result, C.R. 04/15 asked for alternative fiscal measures (a contingency plan).

Two laws (L533/99 and L781/02) regulated the authorization for international operations of public credit. Only one of them was once challenged; one ruling decided the constitutionality of the law by unanimity. Law 1001/05 established measures concerning the portfolio of the public institution in charge of housing, and it was not challenged. Finally, the IMF recommended the creation of an agency to coordinate fiscal policy at all levels of government with the advice of the FAD which was not realized (C.R 05/1540).

Table 4.13: Non-neutral decisions related to Budget management

Law	Total number of sentences	Total number of rulings	Rulings of constitutionality.	Rulings of conditioned constitutionality	Ruling of unconstitutionality	Neutral decisions	Sentences with concurring votes	Sentences with dissenting votes	Unanimous sentences
L 533/99	1	1	1	0	0	0	0	0	1
L 547/99	5	8	3	1	3	1		2	3
L 550/99	19	26	12	2	3	9	3	2	17
D 955/00	3	3	0	0	1	2	1	1	2
L 617/00	28	56	19	5	7	25	20	9	19
L 626/00	1	1	0	0	1	0	0	0	1
L 628/00	5	6	1	2	0	3	3	2	3
L644/01	1	3	1	1	1	0	0	1	0
L 779/02	1	2	1	0	1	0	0	0	1
L780/02	1	1	1	0	0	0	0	1	0
DL1959/02	1	2	1	1	0	0	0	1	0
DL2749/02	1	2	1	0	1	0	0	1	0
L 781/02	0	0	0	0	0	0	0	0	0
D900/03	1	1	0	0	1	0	1	1	0
L 796/03	1	2	1	0	1	0	0	1	0
L 812/03	20	26	7	1	8	10	5	9	11
L 819/03	2	2	0	0	1	1	0	1	1
L 844/03	1	1	0	0	1	0	0	0	1
L 848/03	5	5	3	2	0	0	1	0	5
L 917/04	1	1	0	0	0	1	0	0	1
L 921/04	2	2	1	0	0	1	0	1	1
L 922/04	0	0	0	0	0	0	0	0	0
L 998/05	4	5	2	0	2	1	0	2	2

L 1001/05	0	0	0	0	0	0	0	0	0
L 1110/06	0	0	0	0	0	0	0	0	0
Total	104	156	55	15	32	54	34	35	69

Source: Annex 4.5

4.4.1.3 Modernization of the State

C.R.99/149 referred to the restructuring process in the public sector, i.e. the need to downsize it and to reduce staffing. C.R.02/15 proposed that the downsizing at the national level would be merged with a downsizing at the territorial level. C.R. 03/19 mentioned the presentation of a bill to modernize the state. This was repeated in C.R. 03/181.

The modernization of the state was initially regulated by only two statutes, which were the only ones analyzed by the Court in this sector. Both laws delegated legislative competences to the President (P.C.150 (10)) to reform the organization of the state. As a result, most of the restructuring of the state was performed by the government through decrees with legal status. For the purpose of statistical processing, these decrees (“decretos-ley”) were included in the observation corresponding to the law of delegation (the one that conferred legislative competences). When a sentence declared the article of the law that delegated the legislative competences as unconstitutional, the D.L. enacted under these competences is automatically unconstitutional and the corresponding judicial decision was counted separately. This procedure affects the total number of adjudications but does not affect the analysis of Court behavior over time or across policy areas.

From this set of sentences, 79 adjudications were produced, 17% were unconstitutional and 9% conditioned the constitutionality. Most of the sentences were adjudicated by unanimity (71%). Non neutral rulings affecting Law 573/00 declared mainly the unconstitutionality of some reforms, but they were no substantial to the restructuring program. This statute, enacted under the EFF arrangement and during the Pastrana government, conferred legislative competences for the restructuring of control organisms (The General Comptroller; the Public Ministry and the General Accountant) the General Prosecutor and the Electoral Institution (National Registrar of the Civil Status). The regime of liquidation and dissolution of public entities and the simplification of procedures were also regulated but these laws were struck down.

Law 790/02 was enacted under the first Stand-by arrangement and at the beginning of the first Uribe government. It is a combination of a law of authorizations with a delegation of legislative competences to realize the reform program of the public administration. It authorized the President to realize the fusion of public entities based on its own constitutional competences (P.C. 189 (15)) and delegated legislative competences to eliminate, merge and separate public entities created or authorized by law and to reorganize the executive branch (P.C. 150(10) and 189(14)). Under this law the most important restructuring of the adjustment program was performed, including ministries, administrative departments and decentralized institutions, including the one of the public social security system (ISS). Non-neutral decisions affecting Law 790/02 declared the conditioned constitutionality of some articles, but they did not have a representative impact on the structural adjustment program (see chapter six). C.R. 04/199 reported the closure of 29 public entities and the elimination of 14.000 employees. C.R. 05/1540 reported the closure of 33 public entities and the restructuring of other entities thus cutting 27.000 jobs.

Another relevant issue concerning the Modernization of the state was the privatization process in strategic sectors as electricity, banking (linked to the restructuring of the financial sector), mining and telecommunications. One particularity of these reforms was the permanent reference to the problems of public order (violence) as the main causes of their non implementation (C.R. 01/12, C.R. 01/64, C.R. 02/15 and C.R. 03/19). C.R.04/15 mentioned the restructuring of Telecom and the improvements in the privatization program were registered in C.R.04/199, C.R. 05/1540 and C.R. 05/392. The latter highlighted the need to enhance the commercial orientation of public entities. The program was also an important issue in C.R. 06/234 and C.R. 06/408.

This restructuring was concretized in the statutes referring to Icetex (L1002/05) and Ecopetrol (L1118/06). The reform of Ecopetrol was first mentioned in C.R. 99/149 and then in C.R. 04/15. In C.R. 04/199 the IMF highlighted that Ecopetrol was strengthening its commercial orientation and in C.R. 05/392, its reform was proposed as a structural benchmark. C.R. 06/234 presented an analysis of Ecopetrol and in C.R. 06/408 a plan to capitalize Ecopetrol was proposed²⁹⁵. Ecopetrol was particularly crucial in the periodical evaluations of the IMF during the execution of the second SBA arrangement.

²⁹⁵ In the oil sector, the scaling back of subsidies to gasoline, diesel and electricity was also part of the structural reforms analyzed by the IMF C.R., however they were not implemented.

The procedure to liquidate public entities (L1105/06) was also reformed. But until the end of the analyzed period, it was not challenged. The restructuring of the ISS was included in several C.R. (01/12 and 01/64), it was a structural benchmark in C.R. 02/15, and continued to be included until its restructuring was announced in C.R. 05/1540 (see chapter 5). Furthermore, the restructuring of public hospitals was another structural reform mentioned in C.R. 02/15 and C.R. 03/181. C.R. 05/1540 noted their restructuring.

Table 4.14: Non-neutral decisions related to the Modernization of the Public sector

Law	Total number of sentences	Total number of rulings	Rulings of constitutionality.	Rulings of conditioned constitutionality	Ruling of unconstitutionality.	Neutral decisions	Sentences with concurring votes	Sentences with dissenting votes	Unanimous sentences
L 573/00	19	36	11	1	9	15	2	2	17
L 790/02	25	43	19	6	4	14	8	11	14
L 1002/05	0	0	0	0	0	0	0	0	0
L 1105/06	0	0	0	0	0	0	0	0	0
L 1118/06	0	0	0	0	0	0	0	0	0
Total	44	79	30	7	13	29	10	13	31

Source: Annex 4.5

4.4.1.4 Transparency of the Public Sector

The transparency of the public sector was addressed by eight laws. The Constitutional Court produced 55 sentences of which 84% were unanimous. Of 76 rulings 12% declared the unconstitutionality and 9% conditioned the constitutionality of some reforms. 31% of the total number of sentences refers to Law 678/01 which regulates the liability of public employees when the State was condemned to indemnity; all the sentences were ruled unanimously. Then, Law 610/00, regulating fiscal responsibilities of public officers and civilians exercising public functions, represented 27% of the total number of sentences, of which 67% were decided by unanimity. Law 716/01 (Clearing accountancy of official entities) and Law 901/04 (Prorogation of law 716/01) constitute 22% of the total number of sentences, of which 14% were decided unanimously. Statutes seeking to improve the management of the State represent 21% of the total number of sentences of this policy area: Law 598/00 created the systems of SICE, CUBS and RUPR²⁹⁶, Law 825/03 established the framework for the regulation of the management of the cooperation programs and projects financed by the EU; Law 872/03 regulated the system for quality management in the executive

²⁹⁶ Cf. Annex 4.5

branch; Law 821/03²⁹⁷ prohibited public administrators of territorial entities to celebrate contracts with relatives of the members of political corporations.

Although this sector was central in the IMF arrangements, most of the constitutional case law did not refer directly to the topic. The majority dealt with procedural issues not directly related with the structural reforms and therefore, they were not relevant for the aim of this thesis. The only case which could produce direct effects on IMF arrangements, is C892/01 (Law 598/00) which struck down the delay given to the State to pay moratorium interests, because it violated the principle of contractual responsibility of the State. Although it might be related with the legal defense of the State, included in the IMF structural program, this reform was not mentioned by the government nor by the IMF. In any case, the rulings on these topics were included to allow a global analysis of constitutional case law related to the IMF structural reform program. Other proposals mentioned by the IMF referred to the improvement of statistics. The latter together with the Legal Defense of the State, were approached by administrative measures not analyzed by the Constitutional Court. The reform of the public procurement law (L80/93) was mentioned as a structural reform in C.R. 03/19 and C.R.03/181. In C.R. 04/199 it was included as a structural benchmark but it was postponed and C.R. 05/1540 registered that the bill did not pass and instead some decrees were due to be enacted to strengthen this area. This was the most important reform in this sector.

Table 4.15: Non-neutral decisions related to Transparency of the Public Sector

Law	Total number of sentences	Total number of rulings	Rulings of constitutionality	Rulings of conditioned constitutionality	Ruling of unconstitutionality	Neutral decisions	Sentences with concurring votes	Sentences with dissenting votes	Unanimous sentences
L 598/00	3	5	2	2	0	1	0	0	3
L 610/00	15	17	10	1	2	4	4	5	10
L 678/01	17	27	10	2	4	11	1	0	17
L 716/01	6	5	0	0	2	3	2	1	5
L 821/03	7	10	2	2	0	6	5	2	5
L 825/03	1	1	1	0	0	0	0	0	1
L 872/03	0	0	0	0	0	0	0	0	0
L 901/04	6	10	2	0	1	7	1	1	5
Total	55	76	27	7	9	33	14	9	46

Source: Annex 4.5

²⁹⁷ It reformed Law 617/00 (included in the budget management) but this law was included here because of its content.

4.4.1.5 Social expenditure

Health and pensions have the particularity that the Constitutional Court has not only influenced the corresponding policies through the judicial review case law but also through the APFR case law, and therefore both were considered. As it has been said before, in the analyzed period the APFR case law represented more than 70% of the total case law produced by the Constitutional Court. Although there are other controversies concerning this judicial procedure, its use has been highly controversial when it recognizes an ESC right. The C.R. of the IMF did not analyze the situation and the enforcement of ESC rights. Only in the last C.R. (06/408) the need to broaden the coverage of health, education and other social programs was referred to.

In the case of pensions and public wages, the constitutional case law (APFR) did not have a notorious impact on budget management, because the competence of the ordinary (labor) jurisdiction to solve these challenges was generally accepted (see chapter 6). On the contrary, in the health sector its relevance is not discussed (see chapter 5)²⁹⁸. Meanwhile, a short general reference is presented to complete the jurimetric approach. For statistical purposes, and following the study of García and Rodríguez (2001:465) only when APFR adjudications refer to rendering a social service with fiscal consequences they were taken into account. Those referring to a social right but which actually involve a freedom or a collective right were excluded. Those with fiscal consequences include, first, the request of a payment of social duties (meaning, a duty created by contract or by an administrative regulation) which are not considered as judicial activism, because new obligations are not created; only their payment is the objective of the claim.²⁹⁹ Second, cases in which the Court granted a right after having been rejected by law or by the administration. In 2001, the cases related to ESC rights represented 55% of the total (García and Rodríguez, 2001:465).

Judicial review and APFR case law were compared in the case studies (health, and public sector wages) to evaluate the method of adjudication (argumentation) in both cases and therefore, to identify which of the two actions was used by the Court to play a more activist role and which of them had more influence on public policies. They were also compared to identify whether the Court has argued differently in each of them and how important the socio-economic context presented by the government has been (Cepeda

²⁹⁸ Cf. "Colombia: programa de reforma de salud y seguridad social (CO-0265) Propuesta de préstamo" IDB Washington.

²⁹⁹ García and Rodríguez (2001:468-9) found that principles of human dignity and the effectiveness of rights (P.C. (2)) are the bases of these favorable decisions and that this action increases administrative efficiency through judicial ways, because the APFR has become a routine resort to recover debts from the State.

2004b). Discretionary judicial decisions are also explored through the analysis of the proof valuation in the case of judicial review (Buscaglia 2005, Palacios 2001b and Lopez 2000:24).

4.4.1.5.1 Pensions

The first IMF arrangement included as prior action the creation of the territorial pension fund (C.R. 99/149). Law 549/99 created the fund to pay the actuarial deficit of pensions for sub-national level employees. In C.R. 03/19 the IMF highlighted that the capitalization of this fund was the only achievement under the EFF in this sector. Two rulings struck down some rules of this statute and one conditioned its constitutionality. Law 651/01 created a fund to pay the actuarial deficit of pensions for the public enterprise Telecom as part of the restructuring process.

Streamlining the special pension regimes was a prior action in C.R. 99/149, and a program benchmark in C.R. 03/181 and in C.R. 01/12. The latter also included as a structural benchmark the second generation reform of pensions whose approval was signaled in C.R. 03/19. This report included the reform of the special pension regimes as a performance criterion to be accomplished by the referendum. C.R.04/199, C.R.05/1540 and C.R.05/392 included this reform as a structural benchmark until its approval in 2005. In C.R. 05/1540 the IMF proposed a new general pension reform, judged as unnecessary in C.R. 06/234. Seven legal reforms and one constitutional amendment were approved in the pensions sector; 56 constitutional sentences evaluated these structural reforms, of which 77% were unanimous. These sentences included 75 rulings of which 17% declared the partial unconstitutionality of some reforms and 11% conditioned its constitutionality. Neutral rulings accounted for 46% of the total number of rulings.

Law 797/03 (second generation reform of the general pension system) was remarkably the most challenged reform; it represented 79% of the total number of sentences in this sector, of which 87% were decided unanimously. 67% of the rulings concerned this law. From this, 22% declared the partial unconstitutionality and 12% conditioned its constitutionality. One of these rulings (C1056/03) was mentioned by the IMF and the government as the obstacle to meet fiscal targets included in the IMF arrangements. The main accusation was the increase by 17% of GDP of the actuarial deficit (IMF C.R. 04/15:41; 05/1540:7-8 and 50MEP). C 1056/03 struck down Law 797/03 (11, 18, 21 and 23) for failures in the legislative process, and therefore the content of the reforms was not analyzed. Law 860/03 corrected the legislative failures mentioned in C1056/03. It represented 7% of the total number of rulings of the

sector, from which only one declared the partial unconstitutionality. AL 01/05 (Elimination of the special pension regimes) is responsible for 9% of the rulings, all declaring its constitutionality. Together, the three reforms represented 87% of the judicial review sentences and 83% of the rulings in this policy area.

The reform of the pension system of the military was a performance criterion in C.R. 03/181. Law 797/03 delegated legislative competences to the President to regulate the pension system of the Military and the Public Force. Decree 2070/03 regulated the system but ruling C432/04 struck down the delegation of legislative competences and, as a result, the decree because the legislative did not establish clear and concrete parameters to develop the legislative competences of the Government. Afterwards, Law 923/04 delegated again legislative competences for the same purpose and established the rules, objectives and criteria to establish the pension system of the military and the Public Force. This special regime was respected by the constitutional amendment (AL01/05) which eliminated all special pension regimes. The remaining two reforms relate to the improvement of the welfare conditions of pensions and the control of evasion of social security contributions (Laws 700/01 and 828/03) which did not show non-neutral rulings.

The right to pension, defended as an ESC right by the Constitutional Court through the judicial review, has also been defended through the APFR. This action has been used mainly to seek the recognition of a pension and, therefore, the total number of these actions increased all over the country, particularly during the years of economic crisis (Saez 2000:903-4). However, its importance is lower than in the case of health because many of those APFR were denied, mainly because the Court recognized the competence of the ordinary jurisdiction to solve these challenges. Notwithstanding, the activism of the Court has been notorious in this sector through the theory of the “vital minimum”, adopted by constitutional case law (Arango and Lemaitre, 2002) from foreign case law doctrine.

Table 4.16: Non-neutral decisions related to Pensions

Law	Total number of sentences	Total number of rulings	Rulings of constitutionality	Rulings of conditioned constitutionality	Ruling of unconstitutionality	Neutral decisions	Sentences with concurring votes	Sentences with dissenting votes	Unanimous Sentences
L 549/99	2	7	2	2	1	2	0	1	1
L 651/01	0	0	0	0	0	0	0	0	0
L 700/01	2	3	2	0	0	1	1	1	1
L797/03	38	50	11	6	11	22	6	5	33

L828/03	0	0	0	0	0	0	0	0	0
L 860/03	5	5	1	0	1	3	4	1	4
L 923/04	3	3	1	0	0	2	0	1	2
AL 01/05	6	7	2	0	0	5	1	4	2
Total	56	75	19	8	13	35	12	13	43

Source: Annex 4.5

4.4.1.5.2 Health Sector

The freeze of intergovernmental transfers was a prior action in C.R. 99/149. In C.R. 01/12 the IMF noted that the government modified the proposal. In C.R. 03/19 the IMF registered the approval of a transitory reform of the intergovernmental transfers, although not as suggested by the IMF. AL01/01 reformed the intergovernmental transfers (Revenue Sharing System (SGP)). No declaration of unconstitutionality or conditioned conditionality affected this constitutional amendment. C.R. 02/15 mentioned as a structural benchmark Law 715/01, enacted to develop the constitutional amendment (L.A. 01/01) of the SGP earmarked mainly for health and education. C.R. 04/15 and C.R. 04/199 mentioned the assistance of the FAD to improve the responsibility of territorial governments to be improved by Conpes (National Council of Economic and Social Policies). This statute showed the majority of non-neutral rulings in the sector. However, they represented 21% and 12% respectively of the total number of rulings analyzing this law. Unanimous sentences were the majority: 89% of the total number of sentences. In C.R. 05/1540 the IMF asked for a permanent reform to avoid the backing to the situation before 2001 and in C.R. 05/392 the government committed itself to analyzing the system of SGP. C.R. 06/234 included the constitutional reform (AL) as a structural benchmark and C.R. 06/408 presented it as a crucial reform.

Concerning the collection and distribution of health resources of territorial entities, L643/01 regulated hazard games and the national lottery, whose resources were earmarked for the health sector in the departments (regions). Only one ruling of unconstitutionality affected this law (see chapter five). It was mentioned in the first three country reports (C.R. 99/149, C.R. 01/12 and C.R. 01/64), until its enactment.

Law 972/05 is the only reform that regulated the provision of the service to patients with catastrophic illnesses (particularly HIV patients). Despite the high relevance of this issue via the APFR case law, no challenges were reported during the period of observation. Chapter five further explored the regulation of the health service provision, especially because of the relevance of the discussion within the Constitutional Court concerning the tension between the regulation of economic sectors and the effectiveness of ESC rights. The health sector is crucial from the perspective of the national budget, because it has been

generating the largest numbers of adjudications through the APFR. The Court has been regulating health provisions through this action, arguing that while Congress did not regulate the scope of ESC rights, the Court should apply the P.C. This way, it reinforces the redistributive competence of the State (Arango, 2001, 2002; Cepeda 2004b). The relevant economic consequences were also highlighted by a former justice of the Court who confirmed that the “vast majority of cases analyzed by the way of the APFR, concern social rights, and among these, the right to health is in the first place” (Cepeda 2004b:620). Despite of the constitutional guidelines, neither the government nor the Congress have taken any measure to limit the discretionary action of the Court. The only attempt was Law 972/05 which was not yet analyzed by the Constitutional Court. The growth of these cases over the last years was mainly explained by the economic crisis of 1998-2001; however, during the good economic performance of 2003-07 the growth was even more notorious and this was seen as a cause of ruling T860/07 which is a real “judicial statute” on the provision of health services (see chapter 5).

Table 4.17: Non-neutral decisions related to the Health sector

Law	Total number of sentences	Total number of rulings	Rulings of constitutionality	Rulings of conditioned constitutionality	Ruling of unconstitutionality	Neutral decisions	Sentences with concurring votes	Sentences with dissenting votes	Unanimous sentences
L643/01	13	16	12	0	1	3	2	2	11
AL 01/01	3	4	2	0	0	2	1	1	2
L715/01	31	57	16	7	12	22	22	4	31
L 972/05	0	0	0	0	0	0	0	0	0
Total	51	77	30	7	13	27	25	7	44

Source: Annex 4.5

4.4.1.6 Restructuring of the Financial System

Four legal reforms of the financial system were enacted in this period. Law 546/99 regulated housing and provided the framework to regulate the special system of housing financing. Some incentives for savings and taxes to support the system were included. It was enacted before concluding the EFF arrangement.

In its periodical C.R.'s the IMF was highly active in the evaluation of the financial sector. C.R. 02/15 included as structural benchmarks bills to restructure the mortgage sector and to privatize public banks. Law 795/03 restructured the financial sector by partially reforming the Organic Law of the Financial System. Particularly, the elimination of the seizure and selling by the state of financial institutions was relevant for

the program. In C.R. 04/199 the IMF highlighted that the structural benchmark of privatizing public banks was unachieved in a 100%. Law 1114/06 earmarked social housing subsidies and regulated social housing; this reform was not analyzed by the IMF, nor by any ruling in the period of observation.

C.R. 03/19, C.R. 05/1540, C.R.05/392, C.R.06/234 and C.R. 06/408 referred to the need to enact a law to strengthen the independence of the supervisors of the financial sector. The IMF (MFD) provided assistance to improve credit risk measurement. Those reforms were considered as a structural benchmark in C.R. 06/234, but they were not enacted before the end of the arrangement.

C.R. 05/1540, C.R. 05/392 and C.R. 06/234 included as a structural benchmark the regulation of national capital markets because of its relevance for financing investment. Law 964/05 is the Framework Law for the government to regulate the management, use and investment of resources involving the general public through the stock exchange. The enactment of its regulations was also a benchmark until the end of the program. The implementation was planned with the assistance of the World Bank.

Housing rules were highly controversial in the year just before the observed period (1998-9) but the laws enacted during the term of the IMF arrangements were less controversial. Although 24 out of 25 sentences referred to housing, most of them were decided unanimously (almost 80%). Law 964/05, on security markets, referred to in the IMF arrangements as an important structural benchmark, was challenged only once and the Constitutional Court declared its constitutionality by unanimity.

Table 4.18: Non-neutral decisions related to the restructuring of the Financial System

Law	Total number of sentences	Total number of rulings	Rulings of constitutionality	Rulings of conditioned constitutionality	Ruling of unconstitutionality	Neutral decisions	Sentences with concurring votes	Sentences with dissenting votes	Unanimous sentences
L546/99	12	21	5	2	3	11	1	1	11
L 795/03	12	14	9	0	2	3	3	4	8
L 964/05	1	1	1	0	0	0	0	0	1
L 1114/06	0	0	0	0	0	0	0	0	0
Total	25	36	15	2	5	14	4	5	20

Source: Annex 4.5

4.4.1.7 Interventions in private sectors (systemic reforms)

A series of structural reforms were taken together in this category. First, Laws 590/00 and 905/04 created incentives for small and medium sized enterprises. They were challenged only once, with one decision declaring the unconstitutionality and taken by unanimity. This was not directly a relevant sector in the IMF arrangements, but as it was related with the economic program, it is mentioned here.

Second, although the labor reform was not part of the main structural program of the IMF arrangements, it was a central point of concern in many IMF C.R. C.R. 99/149 mentioned the need to implement a policy to reduce the impact of the backward-looking wage indexation ordered by C815/99 (see chapter 6). In C.R. 01/64 the IMF analyzed the lack of flexibility of the labor market in Colombia and in C.R.01/68 the unemployment situation. In C.R.03/19 the IMF observed that the labor market reform was approved but considered it as insufficient because of the continuation of high payroll taxes and wage indexation as ordered by the Court (C815/99). C.R. 03/181 reiterated this diagnosis. Law 789/02, the labor market reform, has thus been a relevant topic for the IMF structural adjustment program and for the protection of ESC rights by the Constitutional Court. Of a total of 17 sentences, 10 were unanimous. 23% of the rulings declared the unconstitutionality and 10% conditioned the constitutionality. This reform provoked a high level of controversy in the country, basically centered on workers' rights. Particularly, C 038/04 analyzed the possibility to impose limitations on acquired labor rights, normally not admitted by the international treaties ratified by Colombia. The Court accepted the limitation of the acquired labor rights because it was found duly justified. It found that in the legislative debates the adopted measures were clearly justified as being necessary to attack unemployment. In addition, the Court found that despite some analyses that contradicted the efficacy of the measures, the constitutional judge should respect the decisions of the legislator because he has the backing of popular representation. The Court concluded that the justification of the convenience and need of the measure was "in abstracto" sufficient and that moreover, the evaluation of the reform would be performed in two years. This ruling was highly controverted inside the Court, with 5 partially dissenting votes. In C.R. 05/1540 the reduction of the unemployment rates was further presented as one of the policy challenges for the country after the first SBA arrangement. In 2008, the law was challenged because it did not produce the mentioned economic effects, but C257/08 considered that the challenge did not prove the absence of *res judicata* of C038/04 and rejected the bad results of the labor market reform in terms of fighting unemployment.

Finally, Law 963/05 which provided legal stability to the investors was classified in this section.³⁰⁰ This law was not highlighted in the IMF arrangements as specific structural commitment. However, the increase of foreign direct investment (FDI) was analyzed. It was challenged three times and the Constitutional Court produced six rulings, one of them conditioned partially the constitutionality.

Table 4.19: Non-neutral decisions related to interventions in private sectors

Law	Total number of sentences	Total number of rulings	Rulings of constitutionality	Rulings of conditioned constitutionality	Ruling of unconstitutionality	Neutral decisions	Sentences with concurring votes	Sentences with dissenting votes	Unanimous sentences
L 590/00	0	0	0	0	0	0	0	0	0
L 789/02	17	30	11	3	7	9	5	7	10
L 905/04	1	1	0	0	1	0	0	0	1
L 963/05	3	6	3	1	0	2	2	2	1
Total	21	37	14	4	8	11	7	9	12

Source: www.ramajudicial.gov.co

4.4.2 Synthesis of the jurimetric analysis of the Constitutional Court case law

From the confrontation of IMF C.R. with the legislative and judicial production in the analyzed period, some preliminary observations can be drawn: (i) in the public revenue sector it was notorious that the government and the Congress did not follow the guidelines of the IMF in tax issues, although the advice provided by the agencies of the IMF was remarkable. (ii) In the area of budget management, the most relevant issues for the IMF were not met, although the advice of IMF agencies was again remarkable. (iii) Concerning the modernization of the state, the level of compliance with the IMF arrangements was highly remarkable; the objectives of staff reduction and restructuring, privatizations and commercial orientation of public enterprises were met. (iv) In the sector of transparency, the main benchmarks, the reform of the public procurement law and the enforcement of the legal defense of the state were not met as suggested, but by administrative measures instead. (v) In the pensions sector, the commitments were met with delay but at the end it seems that the IMF judged them as insufficient and asked for a new structural reform. (vi) In the health sector, the main reform of the intergovernmental transfers was accomplished but not followed the guidelines suggested by the IMF who asked for a definitive reform not enacted until the end of the program. The assistance of the FED was also registered in this sector as well as the complete lack of interest by the IMF and the government in the crucial problem of coverage. Finally, (vii) in the financial sector, the

³⁰⁰ It was partially reformed by Law 1111/06 national tax reform which was included in the fiscal revenue sector.

assistance of the IMF agencies and the World Bank was also highly remarkable but the benchmarks presented an important delay.

Table 4.20 summarized the information from annexes 4.4 and 4.5 showing the number of sentences produced per sector and per year, and reflects, rather than the activity of the Constitutional Court, the activity of litigants through the challenges of the reforms. Classifying the sentences by year of the challenged law allows to visualize the year in which the enacted reforms were the most controversial, and classifying by sector allows to visualize the sectors in which litigants were the most active. The most dynamic sector was fiscal revenue (26%), followed by budget management (22%) and the lowest levels are found in the intervention in the private sector (4%) and in the restructuring of the financial system (5%). This may be explained by the low rate of statutes enacted in the period, although that may not be the only reason. Fiscal revenue showed the highest number of sentences in 2003 (29%), followed by 2004 (20%), and the least in 2006 with a notorious 4% of participation. The potential explanations of the high number of challenges in fiscal revenue may be related with the issue (tax system) but also coincide with the activity of interest groups which are organized through the Colombian Association of Tax Law (ICDT) (Cf. Annex 4.6 where demanding parties were identified).

Budget management showed the highest figure in 2001 (33%), followed by 2004 (21%). The modernization of the state was highly representative in 2004, after a massive reduction of public employment in 2003 (due to the restructuring plans). Transparency was notable in 2002, which coincided with the enactment of the main statutes on fiscal responsibility, whereas pensions were notable in 2004 (52%) after the reform of the second generation pension regime. The health sector was the most challenged in 2002, followed by 2003, which coincide with the reform of the intergovernmental transfers (SGP).

Looking at this table in combination with table 4.11, a comparative evaluation of the activity of the Congress and the Constitutional Court can be performed. The most productive year in terms of challenges was 2004 (26%), followed by 2003 (19%) which coincide with the most productive legislative years. The least productive was 2000 (6%), followed by 2005 (8%). The first is explicable by the term of the constitutional judicial review process and the start of the period of observation, i.e. December 1999. A trend is notorious; apparently the higher numbers of challenges correspond to the two years following the enactment of a controversial statute. In some cases, the controversy remains and challenges continue to be presented

after the first two years. In fact, 2003-4 were the most productive years, both in the legislative and in the judiciary. It coincided with the term of the first stand-by arrangement. Another remark is that the less productive years (2005-6), in both the legislative and the judiciary coincided with the term of the second stand-by arrangement which was the most precautionary of the three IMF arrangements. However, the highest level of compliance registered by the IMF C.R. was the third arrangement where the least statutes were enacted.

Table 4.20: Total number of judicial review sentences of structural reforms enacted under IMF arrangements.

Sector	EFF				STAND-BY		STAND-BY		Total per sector.	%
	1999	2000	2001	2002	2003	2004	2005	2006		
Fiscal revenue	-	-	24	20	36	24	15	4	123	26
Budget Management	-	12	34	10	8	22	6	10	104	22
Modernization of the State	-	9	8	-	4	20	1	2	44	9
Transparency of the public sector	-	-	7	19	9	11	4	5	55	11
Pensions	-	1	1	-	11	29	5	9	56	12
Health sector	-	-	4	20	10	8	4	5	51	11
Restructuring the Financial sector	-	9	2	-	7	1	2	4	25	5
Intervention in private sectors	-	-	-	-	8	7	2	4	21	4
Total per year	-	31	80	69	93	122	39	43	479	
Percentage	0	6	17	14	19	26	8	9	100	100

Source: Constitutional Court Website www.ramajudicial.gov.co and Annex 4.4

Another comparison in this jurimetric analysis was developed in table 4.21 which grouped the total number of rulings per sector and per decision. It can be observed that neutral decisions are the majority (38%). The pensions sector presented the highest number of neutral decisions (47%) and interventions in the private sector the lowest (30%). Rulings of constitutionality follow in importance (36%). The reform of the financial system showed the highest percentage (42%) and pensions the lowest (25%). Rulings conditioning the constitutionality represented 9% of the total number of rulings; the distribution among sectors is more or less similar, being the lowest the restructuring of the financial sector (6%). Rulings declaring the unconstitutionality of a reform amounted to 17% of the total number of adjudications. In the intervention in the private sector, they reported the highest percentage (22%), together with budgetary management (21%); whereas, transparency of the public sector reported the lowest score of decisions of unconstitutionality: 12%.

Unanimous sentences represented the majority (76%). In the health sector, they reached (86%) of the total number of sentences, followed by the transparency of the public sector (84%) and fiscal revenue sector

(82%). The most controversial sector in the Court decision making process was the intervention in the private sector with only 57% of unanimous sentences (which may be explained by the inclusion of the reform of the labor market). The scores of unanimity in sectors related with ESC rights were remarkably high (pensions 77% and health 86%), whereas they are responsible for a big part of the APFR case law, which provoked vivid controversies in the public opinion. The high level of unanimity of sentences referring to public revenue (82%) is also remarkable, although they were the most challenged statutes.

Table 4.21: Rulings per sector and per decision

Sector	F.R.	B.M.	M.S.	R.F.S.	T.P.S.	I.P.S.	P.	H.	Total
Rulings of constitutionality	63	55	30	15	27	14	19	30	253
Percentage	37%	35%	38%	42%	36%	38%	25%	39%	36%
Rulings of conditioned constitutionality	17	15	7	2	7	4	8	7	67
Percentage	10%	10%	9%	6%	9%	11%	11%	9%	9%
Ruling of unconstitutionality	29	32	13	5	9	8	13	13	122
Percentage	17%	21%	16%	14%	12%	22%	17%	17%	17%
Other neutral decisions	63	54	29	14	33	11	35	27	266
Percentage	37%	35%	37%	39%	43%	30%	47%	35%	38%
Total number of rulings	172	156	79	36	76	37	75	77	708
Sentences with concurring votes	25	34	10	4	14	7	12	25	131
Percentage	20%	33%	23%	16%	25%	33%	21%	49%	27%
Sentences with dissenting votes	22	35	13	5	9	9	13	7	113
Percentage	18%	34%	30%	20%	16%	43%	23%	14%	24%
Unanimous sentences	101	69	31	20	46	12	43	44	366
Percentage	82%	66%	70%	80%	84%	57%	77%	86%	76%
Total number of sentences	123	104	44	25	55	21	56	51	479
	26%	22%	9%	5%	11%	4%	12%	11%	100%

Source: Annex 4.5

It is, finally, interesting to contrast the above conclusions on degrees of controversy of particular sectors with data reflecting public opinion on Constitutional Court case law. From a systematic screening of headline news in the main daily and weekly newspapers in Colombia, for the period 2004-2008, and following the methodology suggested by Mayhew (1991), Epstein and Segal (2000), Staudt et al. (2008) and others, a number of conclusions can be drawn. First, it can be observed that there is a rising trend in press coverage of Constitutional Court rulings. Second, health and pensions sectors attracted more than proportionate attention, although this is in part explained by the APFR rulings. Third, rulings concerning the private sector also attracted attention. There is thus not necessarily a correlation between the attention captured by issue areas in the public opinion, on the one hand, and the relative degree of controversy in the Court. At the same time, it is well possible that controversy in the Court reflects or spills over to controversy in the public (case of the private sector). In the case of health, it is well possible that the Court

uses this sensitivity of the public to make a case (towards the legislative and executive powers) with respect to ESC rights through its case law. Its relative power vis-à-vis other branches of the state, is then backed by the public opinion and high degrees of internal consensus. These conclusions are still somewhat speculative, however. The quantitative data do not allow drawing stronger conclusions.

Table 4.22: Constitutional Court Sentences as headline news (2004-2008)

	2004		2005		2006		2007		2008	
	#H (%)	#S(%)	#H (%)	#S (%)	#H (%)	#S(%)	#H(%)	#S(%)	#H(%)	#S(%)
Fiscal revenue	1 (9)	0(0)	0(0)	0(0)	0(0)	0	0(0)	n	0(0)	n
Budget management	2 (18)	3 (23)	0 (0)	4(31)	0 (0)	0	0(0)	n	0(0)	n
Modernization	0(0)	0(0)	0(0)	0(0)	0(0)	0	0(0)	n	0(0)	n
Transparency	0(0)	6(46)	0(0)	0(0)	0(0)	0	0(0)	n	0(0)	n
Pensions	4(36)	3(23)	2(40)	5(38)	4(40)	0	7(18)	n	8(36)	n
Health	3(27)	0(0)	1(20)	0(0)	5(50)	0	13(8)	n	11(50)	n
Financial sector	0 (0)	0(0)	2(40)	1(8)	0(0)	0	11(28)	n	1(5)	n
Interventions in private sectors	1(9)	1(8)	0(0)	3(23)	1(10)	0	8(21)	n	2(9)	n
<i>Total</i>	11(100)	13(100)	5(100)	13(100)	10(100)	0	39(100)	n	22(100)	n
IMF arrang. as headline news	9	-	15	-	3	-	4	-	0	-

Note: Headline news is defined as news items included in electronic news bulletins of *El Tiempo*, *El Espectador*, *Portafolio* and *Semana*, which are the major daily and weekly titles of the Colombian press.

#H = number of headline articles referring to Constitutional Court sentences, per policy area.

#S = number of Constitutional sentences containing non-neutral rulings, per policy area (see tables 4.11-18).

n = not included in analysis.

4.4.3 Further analysis of non neutral decisions.

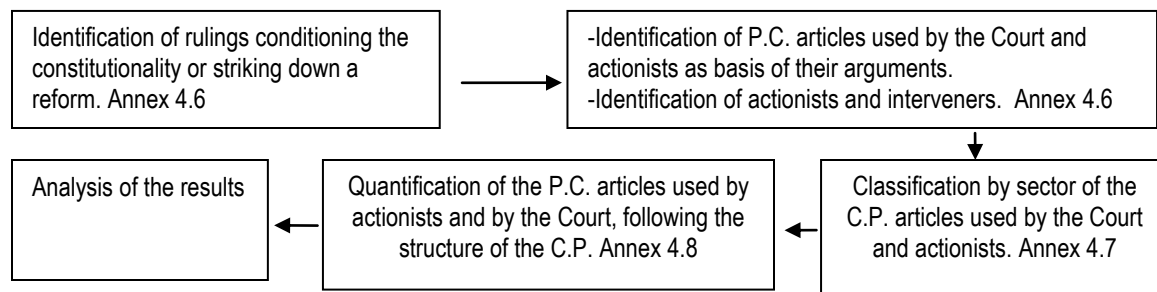
Annex 4.6 summarized judicial review rulings in which the unconstitutionality or the conditioned adjudication may affect the economic outcome of the structural adjustment process because it may produce other effects than those established by the Law. They were classified by policy sector seeking to identify some variables to analyze the argumentation of the Court when analyzing structural reforms. To make a comparison possible, the arguments of the challenges are presented in the “violation” cells, by way of the articles of the P.C. used by the actionist as a basis of the challenge against a reform. The cells named “C.C. arguments” contain the articles of the P.C. that the Court considered as being violated by the reform, and therefore they were the basis of the ruling. Statutory laws (P.C. (152-3))³⁰¹, Organic laws (P.C. (151)³⁰²) and international treaties, mentioned as violated by the laws, were also included.

³⁰¹ They regulate special issues as fundamental rights, and should be approved by absolute majority of the Congressmen. They have an automatic constitutional control by the Constitutional Court before their enactment.

³⁰² They regulate the exercise of the legislative activity and should also be approved by absolute majority of the Congressmen.

Although other comparisons are possible, this design sought to draw some general and quantified in-depth conclusions on the constitutional case law. This procedure allowed, for instance to detect the number of decisions of unconstitutionality taken for procedural reasons, which means, without analyzing the contents of the law. This variable could be interpreted as an indicator of the institutional quality of regulators in Colombia; in fact, failing reforms can also be due to failures in the legislative process. But this variable may also indicate the reluctance of the Court to analyze certain complex topics. In-depth case-studies are then needed to further explain the behavior of the Court. Figure 4.5 shows the steps taken in the data processing process to obtain the results presented below.

Figure 4.5 Quantitative analysis of the argumentation of the Court: data processing.



As explained before, in a sentence, more than one decision can be adopted; but also, one decision may be based on different articles of the P.C. For instance, a tariff increase of a tax may violate three or four articles. This means that the total figures of the tables do not coincide with the number of non neutral decisions nor with the number of sentences. However, they may show the tendency of the argumentation of the Constitutional Court in each sector, the tendency in the challenges and the relation between the two arguments, i.e. the rate of acceptance of actionist arguments.

Table 4.23 presents a synthesis of the data processed in annexes 4.6, 4.7 and 4.8. It shows the most used chapters of the P.C. by litigants and by the Constitutional Court when they oppose the structural reforms. The presentation of the norms follows the structure of the P.C. (first column). The second and third columns show the frequency by which articles are used by actionists and by the Court, divided into policy sectors. When the chapters of a title of the P.C. are relevant, they are shown in detail, but then, the total of each title of the P.C. was also presented.

From the analysis of these data some remarks can be drawn: First, articles used by actionists are much more numerous than those accepted by the Constitutional Court as violated. In some sectors, articles used by the actionist do not correspond to those used by the Court, as in the case of pensions. Furthermore, cases in which the Court is more activist can be suggested by the use of articles to strike down a law that were not used by the actionist nor by the interveners. Second, the use of articles falling under the title on fundamental rights by both actionists and the Court is highly remarkable. Within this category, first and second generations of rights are the most used, particularly in fiscal revenue and budget management, followed by pensions. Third, the second type of most used articles for both the actionist and the Constitutional Court are related to the legislative process. The declaratory of unconstitutionality of a reform for procedural reasons (violation of the legislative or executive procedure) is more frequent in decisions concerning budget management and fiscal revenue. However, this does not necessarily allow concluding that the Court, in some “difficult cases”, prefers to use procedural arguments rather than going deep into the substantial analysis of the reform. Fourth, articles referring to the economic regime and public finances were the fourth most used as a basis for the arguments. Within this title, actionists used more rules concerning intergovernmental transfers, while the Court used more the general economic principles.

Table 4.23 P.C. rules, Organic and Statutory Laws and International Treaties used by the challenges and by the Constitutional Court to justify their arguments.

Articles of the P.C.	Articles quoted as violated in the actions									Articles considered as violated by the Court								
	FR	PE	M	T	P	H	FS	Ips	Tot	FR	P E	M	T	P	H	FS	Ips	Tot
Preamble	2	5	1	0	3	1	0	0	12	1	1	0	0	0	0	0	1	3
Fundamental Principles	25	36	15	4	18	16	8	8	130	13	7	4	0	2	1	4	4	35
Fundamental rights	54	37	12	16	23	12	22	11	187	21	5	2	3	9	3	5	3	51
ESC rights	16	47	21	2	25	18	9	11	149	10	12	8	0	8	2	3	3	46
Collective and environmental rights	5	0	0	0	0	3	0	0	8	0	0	0	0	0	0	0	0	0
Protection and application of rights	12	6	5	7	1	2	4	0	37	5	0	0	1	1	1	0	1	9
Citizen duties	9	2		1	1			1	14	3	1			1		1		6
Total Title II	96	92	38	26	50	35	35	23	395	39	18	10	4	19	6	9	7	112
Title III: Inhabitants and territory	2	0	1	0	0	1	0	0	4	0	0	0	0	0	0	0	0	0
Title IV: Democratic participation	0	2	0	0	0	0	0	0	2	0	0	0	0	0	1	0	0	1
Structure of the State	5	17	8	0	2	8	3	1	44	1	2	1	0	0	3	0	1	8
Public function	4	5	4	0	3	5	0	0	21	0	0	4	0	0	3	0	0	7

Total Title V Organization of the State	9	22	12	0	5	13	3	1	65	1	2	5	0	0	6	0	1	15
Composition, functions, and functioning	0	5	0	0	0	0	0	1	6	0	1	0	0	0	0	0	0	1
The Law	52	53	16	14	15	12	10	6	178	15	21	6	0	5	7	3	2	59
The Chambers and the legislators	0	6	0	1	1	0	0	0	8	0	2	0	1	0	0	0	0	3
Total Title VI Legislative	52	64	16	15	16	12	10	7	192	15	24	6	1	5	7	3	2	63
The President, and the government	12	7	3	3	1	7	6	2	41	3	5	1	0	0	4	1	0	14
States of emergency	7	3	0	0	0	2	0	0	12	4	2	0	0	1	0	0	0	7
Public force	4	0	0	0	2	2	0	0	8	0	0	0	0	2	0	0	0	2
International relations	3	0	0	0	0	0	1	0	4	1	0	0	0	0	0	0	0	1
Total Title VII The Executive	26	10	3	3	3	11	7	2	65	8	7	1	0	3	4	1	0	24
The Judiciary	5	1	0	6	0	2	2	0	16	1	3	0	0	1	0	2	0	7
Constitutional jurisdiction	5	4	0	1	1	0	2	1	14	2	0	0	0	0	0	0	0	2
Other judicial organisms	2	0	1	0	0	0	0	0	3	0	1	0	0	0	0	0	0	1
Total Title VIII The Judiciary	12	5	1	7	1	2	4	1	33	3	4	0	0	1	0	2	0	10
Title IX Electoral Organization	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Title X Control Organisms	2	11	6	2	0	1	1	2	25	0	1	2	0	0	2	0	2	7
Title XI Territ. Organization	13	53	1	2	5	9	0	2	85	3	8	0	0	0	0	0	1	12
General regulations	16	11	2	1	1	7	5	0	43	9	5	0	0	0	6	3	1	24
Development Plan	0	16	0	0	1	0	0	0	17	0	3	0	0	0	0	0	0	3
The budget	1	36	0	0	0	2	0	0	39	0	8	0	0	0	1	0	2	11
SGP	26	10	0	1	5	9	2	1	54	7	3	0	0	0	6	0	0	16
Public Utilities	1	7	1	0	1	0	0	0	10	0	4	0	0	0	1	0	0	5
Central Bank	0	2	0	0	0	0	6	0	8	0	0	0	0	0	0	2	0	2
Total Title XII Economic Regime	44	80	3	2	8	18	7	1	163	16	23	0	0	0	14	3	3	59
Title XIII Reform of the P.C.	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	1
Total Internat. treaties	1	9	2	0	0	0	0	8	20	2	0	0	0	2	0	0	1	5
Total Statutory and Organic Laws	3	1	2	0	0	0	0	0	6	2	5	1	0	0	0	0	0	8

Source Annexes 4.6, 4.7, 4.8

The use of general (constitutional and economic) principles is also non negligible. This may support the idea that the Court is more inclined to follow the Dworkinian model of constitutional interpretation, where

general principles are very important, rather than a classical Kelsenian model, where it is not possible to decide on the exclusive basis of general principles and values (Rodríguez G. 1997).

Table 4.24 synthesized per sector the relative use that the Court made of the P.C. rules as a basis for their argumentation to declare as unconstitutional or to condition the constitutionality of some statutes under the structural scheme agreed with the IMF. Several observations can be made: First, the fiscal revenue sector is a clear example of the use that the Court makes of fundamental rights to declare a reform as unconstitutional or conditioned constitutional; they corresponded to almost 40% of the arguments used, while arguments referring to economic regulations and public finances represented only 16%, thus having the same importance as procedural reasons (failures in the process of law enactment). Inside each one of these categories, the protection of rights of first generation (freedom, equality etc.) were at the top of the arguments of the Court. The general constitutional principles, fundamental rights and general economic principles represented more than 50% of the arguments of the Court.

Second, in the budget management sector, arguments based on general principles and fundamental rights, economic regime and legislative procedure were evenly important (close to 25%). However, if arguments based on legislative and executive procedure were considered together, they were the most representative. Regarding the frequency of the use of fundamental rights, the protection of ESC rights were more important than the first generation of rights. However, in this sector the use of general principles and fundamental rights was not as important as in the fiscal revenue sector. Within the category of rules of the economic regime, budget regulations were used most.

By contrast, the tendency of the Court to use the protection of fundamental rights together with the fundamental principles as arguments to strike down or to condition the constitutionality of a structural reform was most notorious in the case of pensions (66%), followed by the financial sector restructuring (59%) and the intervention in the private sector (labor market and investment promotion) (55%). The combined use of general principles and fundamental rights together with international treaties related to fundamental rights (P.C. 93). Together they represented 72% of the total number of arguments used by the Court when striking down or modulating a law in the pensions sector, and 59% in the case of the interventions in the private sector (because of the flexibilization of the labor market). The violation of legislative or executive procedures represented 25% of the arguments; this average is similar as the one in

the other sectors, but it represents the second most used set of arguments in this sector. Within the category of fundamental rights, the first generation of rights is used as much as the ESC rights. However, if international treaties referring to these rights are also considered in this category, then, the protection of ESC rights constitutes the majority of the arguments in this sector. By contrast, general principles were not as present as in the former two sectors. Constitutional rules referring to economic or public finances were not used.

The modernization of the State was, as explained, implemented through the delegation of legislative competences and, as a consequence, several decrees with law status were enacted. The most used arguments dealt also with general principles and fundamental rights (48%) and inside this group, ESC rights were the most used. This may have been caused by the staff reduction which was an important component of the modernization plan (see chapter six). The first legislative delegation, made under the EFF arrangement, restructured mostly independent judicial and control organisms, whereas the second delegation was made under the first Stand-by arrangement (2002-2004) and it related mostly to the executive branch, particularly the restructuring of the Social Security Institute (ISS) (see chapter 5). Arguments based on the organization of the state (including control organisms) represented 28%, due to the nature of the regulations. Procedural failures represented 24% and arguments based on the economic regime and public finances regulations were not present.

The health sector provided amazing results. Although the Court has been protecting the right to health through the APFR as a fundamental right, in the judicial review case law, fundamental rights were not the main basis of their argumentation when it declared structural reforms as unconstitutional or conditioned its application. The violation of the economic regime came in first place (34%), and the violation of the legislative or executive procedure in second place (27%). Fundamental rights and general principles came only in third place (17%), followed by norms that refer to the organization of the State (15%). Inside the categories, the violation of the general economic principles and the violation of norms regulating intergovernmental transfers were the most used by the Constitutional Court. Norms on the competence of the Congress were the most used when the violation of legislative procedure was declared. The right to health (P.C. (49)) was not used by the Court and the right to social security (P.C. (48)) was used only once as an argument. In chapter five a more detailed analysis of those tendencies was developed, as well as the relation between Constitutional Court arguments and IMF concepts.

In the case of the financial sector restructuring, procedural reasons represented 18% of the arguments, followed by economic and public finance reasons (14%). The same percentage for arguments based on economic reasons was presented by the Court in the case of interventions in the public sector.

Table 4.24 Relative use of the articles of the P.C. as basis of the argumentation by the Constitutional Court, per sector

P.C. Titles	F.R.	B.M.	M.	T.	P.	H.	F.S.	I.P.S	Total
Preamble and fundamental principles	14	8	4	0	2	1	4	5	38
Rights, guarantees and duties	39	18	10	4	19	6	9	7	112
Inhabitants and territory	0	0	0	0	0	0	0	0	0
Democratic participation and political parties	0	0	0	0	0	1	0	0	1
Organization of the State	1	2	5	0	0	6	0	1	15
Legislative branch	15	24	6	1	5	7	3	2	63
Executive branch	8	7	1	0	3	4	1	0	24
Judicial branch	3	4	0	0	1	0	2	0	10
Electoral Organization	0	0	0	0	0	0	0	0	0
Control entities	0	1	2	0	0	2	0	2	7
Territorial entities	3	8	0	0	0	0	0	1	12
Economic regime and public finances	16	23	0	0	0	14	3	3	59
Reform of the P.C.	0	1	0	0	0	0	0	0	1
International treaties	2	0	0	0	2	0	0	1	5
Statutory Law	2	5	1	0	0	0	0	0	8
	103	101	29	5	32	41	22	22	355

Source: Table 4.23

Further analysis on the behavior of the Court and its ideology and on behavior of actionists and interveners from a public choice/political economy perspective, was not realized. As many studies concluded, it is quite difficult to identify well organized pressure groups among the latter³⁰³. Although they were explicitly identified (see annex 4.6) their real intentions could not be deduced from the rulings. In some sectors it is possible to detect their presence in the process, be it as interveners or through invitations, as in the case of taxes. However, an in-depth analysis of their behavior and impact goes beyond the scope of the thesis.

³⁰³ In most of the cases they present the action as citizens and without expressing for whom they are working.

5 ESC Rights, the IMF and the Constitutional Court: in Depth Case Study of the Health Sector.

5.1 Introduction

The Colombian health system was presented as the best of the region by the World Health Report in 2000. It is presented also as the country that followed more closely the recommendations of the World Bank Report of 1993 (Homedes and Ugalde 2005:89; Escobar and Panopoulou 2003:653). To place these statements in context, some economic indicators are presented (annex 5.1).³⁰⁴ The economic crisis at the end of the nineties resulted in a drop in total expenditure in health from 2000 until 2003, after which it stabilized. However, in 2007 the level of expenditure increased again, reflecting a global trend in South America.

The total expenditure in health in Colombia is below the Latin-American average. However, government expenditure on health in Colombia as a percentage of total expenditure on health is the highest in the Latin American sample. It is more than 30% higher than the average of the sample. The contrary can be said about private expenditure on health; the case of Colombia is notorious because it is largely inferior to the average of the region and it even decreased. The structure of expenditure in Colombia seems to be similar to the European model whereas the Latin American sample –on average- seems to be closer to the US model. The expenditure on health as a percentage of general government expenditure in Colombia (around 20%) represents the highest level of the Latin American sample, even higher than the selected European countries, and similar to the one in the US. Annex 5.1.2 shows the important role the public sector is playing in financing the health sector in Colombia. It should be noted, however, that this is probably related to the fact that the contributions of the persons affiliated to private health promotion enterprises (EPS) also transit via the Public Solidarity Fund (–FOSYGA–).³⁰⁵

After this brief comparative view of the health sector, the structure of this chapter is explained as follows: first, the dichotomy between the right to health and the provision of the health service is presented from an international and a constitutional perspective. Second, the Colombian regulatory framework is summarized.

³⁰⁴ All South American countries plus Mexico were chosen as well as some countries from Europe (Germany and Spain) because these legal systems have had an important influence in the case law of the Colombian Constitutional Court. Figures from the US were also presented, given the influence on its case law but also of its health system through the recommendations of the World Bank.

³⁰⁵ This is an account linked to the budget of the Ministry of Social Protection and administered by a trust.

Third, the evidence on the implementation of the reforms is briefly presented before analyzing the parameters of the IMF and the structural reforms referring to the health sector. Then, the interaction between the IMF arrangements and the constitutional case law is studied. And finally, the potential budgetary impact of the APFR is analyzed and preliminary conclusions are formulated.

5.2 Health provision and the right to health

5.2.1 Health and equity: the international and conceptual context

At the international level the issue is centered on whether the right to health is a legal right. Some authors, looking at the issue from the US case, this right depends on “one’s political persuasion and moral values”; it is an option (Kinney 2001:1457). The concept of the international human right to health is a framework for the states seeking to promote health care, according to their economic resources and cultural mores (Kinney 2001:1458). The most important international treaty recognizing the right to health is the UDHR of 1948, considered not as a treaty but a statement of policy³⁰⁶. The ICESCR (12) developed further the right to health.³⁰⁷ The UN also created specialized institutions to promote health, as the WHO which may regulate health issues besides its competence to promote health (Kinney 2001:1460). At the level of the OAS, the San Salvador Pact (10) recognized health as a public good³⁰⁸. Finally, the Vienna Declaration and Program of Action (1993) reinforced the duty of “the states regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms” (Kinney 2001:1461-2). However, as stated in chapter 3, for all ESC rights, the challenge is to define their scope and binding character. Their justiciability and implementation through ordinary regulation do not find complete support in the international regulation because ESC rights are considered as “international customary law” (soft law).

The ICESCR committee, seeking the delimitation of “universal expectations” to be met, adopted General Comment 14 which defined the content, implementation and enforcement of the international right to health. It required the country health systems to be institutionally capable to realize this right, which includes “the availability, accessibility, acceptability and quality of needed health care services and facilities”. It defined also the types of obligations of respect, protection and fulfillment. The violation of the

³⁰⁶ Article 25 established that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

³⁰⁷ Other treaties contained provisions on health; e.g., the prohibition of discrimination and the protection of children.

³⁰⁸ It also recognized the duty of the states to provide universal primary health care, universal immunization, prevention and treatment of endemic occupational and other diseases and special protection of most vulnerable groups.

right to health was determined when the state “is unwilling to use the maximum of its available resources for the realization of the right to health”. The specific violations of the duties of fulfillment were particularly addressed: “failures of state parties to take necessary steps to ensure the realization of the right to health” (Kinney 2001:1467-71). General Comment 14 specified also that concrete and immediate obligations are the exercise of the right without discrimination and the establishment of concrete steps in the full realization of the right to health. It established as presumption that retrogressive measures are not allowed. The obligation to fulfill implies the recognition of the right to health mainly by legislative way but complemented with concrete policies, especially the protection of vulnerable groups. These concrete obligations were defined as the promotion of research in health issues, the consideration of the cultural aspects of the provision of health services, the training of health personnel to protect vulnerable groups and the support to people in “making informed choices about their health”. Based on various international instruments, it defined the minimum core obligations: i) “the access to health facilities (...) on a non discriminatory basis”; ii) “the access to the minimum essential food (...) to ensure the freedom from hunger to everyone”; iii) the access to basic shelter, housing and sanitation (...) and potable water”; iv) the provision of “essential drugs” defined by the WHO; v) the guarantee of an “equitable distribution of all health facilities”; vi) the adoption and implementation of “a national public strategy (...) addressing the health concerns of the whole population”, particularly to the vulnerable population³⁰⁹.

Although the aim is that the right to health be the same worldwide, the definition of the content, implementation and enforcement of the international right to health is not yet a concrete binding rule (Kinney 2001:1467-71). The international right to health remains a moral right belonging to the customary law because its implementation and enforcement depends on the concrete economic and cultural framework of each country. These differences led to the formulation of three approaches designed to realize progressively the international right to health: i) the definition of “universal outcome measures” to evaluate the implementation of the right to health. The use of human development indicators has been seen as a step in this direction. ii) The establishment of “a comparative reporting system” which would facilitate the monitoring of the compliance of state duties. iii) The publication of a report of “civil rights violations” as discriminatory acts to health services access which concretizes the interrelation among all human rights (Kinney; 2001:1472-3). However a “legal mandate for a human right to health” would exist

³⁰⁹ Core duties were the pre and post natal health care, the immunization against major infection diseases, the prevention of endemic and epidemic diseases, education and information on health problems and training of health personnel.

when the states “set the promotion of the right to health as priority”. In this context, IMF structural programs have been presented as serious obstacles (Kinney; 2001:1474).

The lack of binding character of those international instruments is seen as the cause to push moral arguments to obtain a major development of the right to health. Two broad categories of equity in health have been distinguished: (i) Equity³¹⁰ in the health of a population, referring to the levels of mortality and morbidity experienced by different social groups. (ii) Equity in the delivery of health care services, related to the levels of access, utilization, and financing of health care services experienced by different population groups (PAHO, 1999:4-6; Flores, 2006:8). WHO/PAHO, established three conditions to define a situation as ‘inequitable’: i) Condition of avoidability (technically, financially, and morally), ii) Condition of choice (i.e. inequities should not be the result of free choice), iii) Condition of agency (i.e. claims should be linked to the responsible agent) (PAHO 1999:6-10). A distinction is also made between horizontal and vertical equity: the first is the equal treatment (in terms of allocation of resources) of equals (in terms of needs), and the second is the unequal treatment of unequals (Flores 2006:8; see also, PAHO (1999:3-4)).

The institutional component of the provision of health has also been an issue with international scope. Particularly, the decentralized organization of the health service and its corresponding effect on equity has been widely debated. Decentralization refers not only to the distribution of competences and responsibilities among levels of government but also among the private sector and the civil society (Bolis 2003:2). The international parameters that support the decentralization of health service provision were developed mainly under the guidelines and supervision of the WHO. It mainly promotes the active participation of the community in the planning of health service provision³¹¹.

The equitable access to health services is closely related to the equitable financing (funding) of services provision (Gilain 1995:4). The limited availability of resources imposes rationing and the need to make choices. A causality between the amount of expenditures and the value accorded to health by a society has

³¹⁰ ISEQH (International Society for Equity in Health) defined equity in health as “the absence of systematic and potentially remediable differences in one or more aspects of health across population groups defined socially, economically, demographically, or geographically” (Flores, 2006:8).

³¹¹ The I International Conference of the Primary Attention in Health was realized in Alma-Ata (1978) and supported by the WHO, PAHO and UNICEF. The OMS organized also the First International Conference on Health Promotion concluded with the Ottawa Letter in 1986, which reiterated the relevance of civil society, and the Conference that finalized with the Bangkok Letter presented the same recommendation. In America, the PAHO organized conferences in Bogotá (1992), Québec (2002) and Rosario (2002), oriented in the same direction (Bolis 2003:2-4).

not been proven yet (Cobbaut 1996:3). A consensus has not been reached on the type and amount of health services necessary to reach an adequate level of care neither (Kinney and Clarck 2004: 289).

These theoretical perspectives which focus on the tensions between the right to health and its financing, are particularly relevant in developing countries. The solutions depend on the political choices. Utilitarianism privileges the role of cost-benefit calculations in the process of rationing. Although the goal is to maximize general welfare, this approach is criticized because it produces discrimination of the most needed. It does not incorporate any condition of equality, different from the positive impact on general welfare (Buchanan 1983:17 quoted by Gilain 1995:9). The libertarian approach, based on the individual liberty, privileges the payment capacity as the main factor to access to the health system. This approach is opposed to redistributive mechanisms as subsidies or taxes and to systems of universal coverage of basic health services (for further discussions see Nodzick 1974 quoted by Gilain 1995:10-3). The equalitarian liberalism, introduced by Rawls, is shared by several legal theories. Van Parijs distinguishes between formal freedom as a set of negative rights and real freedom as a combination of rights with skills to materialize them. Freedom, in this approach, is respected but a real place is attributed to equality (Van Parijs 1991 quoted by Gilain 1995 10-5; 1999).³¹² The theory proposed by Rakowski on health issues, called “equality of fortune”, presented merit and liberty of choice as useful principles in this area. Justice is seen as a synonym of equality but the benefits of a competitive market should not be neglected; therefore, the principle of equality of opportunities is its basis: nobody should have fewer resources than others when he/she did not choose conscientiously to take a risk (Gilain 1995:32). Theories of distributive justice seeking equality cannot ignore the impact of the allocative system on welfare, nor individual responsibility when their actions affect the available resources (Rakowski 1993:43 quoted by Gilain 1995:33).³¹³

³¹² This perspective is based on Rawls' definition of justice (Van Parijs 1991: 71, quoted by Gilain, 1995:10-5).

³¹³ He distinguishes between “the optional luck” and “the brute luck”. The former refers to someone taking voluntarily a risk, and therefore, it could be avoided. The latter relates to involuntary risks, i.e. those that produce real inequities that must be compensated through the design of universal obligatory insurances. Small risks do not have to be considered a “brute luck” (Gilain 1995: 31-5). The relation between poverty and access to health services was not analyzed because the focus was centered on the distinction between normal adults and handicapped, and therefore, the theory sought to convert “brute risks” in “optional risks” through the design of a competitive insurance in health care (Rakowski 1993:89 quoted by Gilain 1995:37), i.e. to allow taking the risk of less compensation, paying lower contributions. As a result, universal obligatory risks would have reasonable prices, particularly for handicapped who need a system of equality of resources provided the limits of the duty of contribution (Gilain 1995: 37-42).

In another approach, the needs are explicitly placed in a situation of scarcity; the provision is limited by the cost. Therefore, choices depend on the relation between coverage and rationing (Castaño 2006:3). The consequentialist approach seeks to maximize aggregate welfare through the management of scarce resources (Sen 2000; quoted by Castaño 2006:13) The cost and management of health care depends on the level of development of the countries, because the availability of resources (budgetary restrictions) determines the qualification of the right to health as an absolute fundamental right (Viseur 2001:S201). Even in countries with universal coverage, those who support the thesis of egalitarian liberalism, admit the unavoidability of rationing in health care provision³¹⁴. The economic constraints visualize three issues to be solved: the tension between increasing expenditures, the responsibility of these expenditures (for the government or for the citizens³¹⁵), and health ethic. In other words, the focus is on the limits between the technologically possible and the economically sustainable.³¹⁶ Some criteria have been outlined, but especially the relevance of the medical opinion in the definition of health policies is strongly supported (Van Parijs 1994:5; Viseur 2001:S206-7). In this sector, the criterion of efficiency (and the normative criteria of private contracts) cannot be the only value that determines the goods and services to be provided in the market, because of the presence of asymmetries of information and the potential violation of fundamental rights (Gonzalez 2000; Bayon 1994: 983-8).

Those choices are even more difficult in poor countries. In addition, the competition between individual and collective rights is more notorious. When someone seeks the right to health considering only his personal needs, budget restrictions are ignored. Distributive justice is the core question at the collective level because whereas less favored social groups usually need more support from the State, in many cases the best organized groups are those who profit from the mechanisms to protect ESC rights and obtain a big share of the budget. The conflict between individual interests and aggregate welfare will not be solved when the former are given an absolute character, because a “*de facto*” rationing occurs at the cost of less favored people (Castaño 2006:17-8). In democratic states, the expectation is that these choices are best made via a democratic process, not through case law. Furthermore, the judiciary is supposed to protect possible violations of those general decisions, instead of acting against them (Cobbaut 1996).

³¹⁴ The pathologies are also different according to the level of development of a country. For example, in developed countries psychiatric illness represent a high budgetary charge (Viseur 2001:S201).

³¹⁵ The impact of irresponsible people that would not pay the contribution, but would benefit, should be counted.

³¹⁶ The US judicial review analyzing the Medicare procedure to recognize benefits accepted a special procedure to revise those administrative decisions (Siegel 2005:20-1).

5.2.2 Constitutional rules and effective protection of the right

Constitutional issues correspond to national jurisdictions but theoretical developments are seeking to explain the absence of correlations between constitutional texts and the effective guarantee of the right to health (Castaño 2006:10). Kinney and Clark (2004) distinguished five types of constitutional provisions that address health care in national constitutions. Their classification does not reflect any judicial statutory or regulatory interpretation in countries' domestic laws, nor assigns the enforceability of the right through judicial review or other means: "1. A statement of *aspiration*, stating a goal in relation to the health of its citizens. 2. A statement of *entitlement*, stating a right to health or health care or public health services. 3. A statement of *duty*, imposing a duty to provide health care or public health services. 4. A *programmatic* statement, specifying approaches for the financing, delivery or regulation of health care and public health services. 5. A *referential* statement, incorporating by specific reference any international or regional human rights treaties recognizing a human right to health or health care" (Kinney and Clark 2004: 290).

The main findings of this study on the situation of the right to health worldwide were the following:

- The main constitutional provisions worldwide, containing rights and obligations, aim at (i) a healthy environment, (ii) a healthy workplace, and (iii) the protection of the right to life. Other provisions authorize governments to enact laws to promote general welfare, as in the US (Kinney and Clark 2004:291).
- 67.5% of the Constitutions worldwide include provisions addressing health care.³¹⁷ They are mainly rigid whereas flexible constitutions do not contain such provisions. Many countries that spend important resources on health care do not have relevant constitutional rules regarding this right; this is the case of countries with the highest per capita government expenditures for health care. Only three of them have constitutional health duties compared to 13 that do not have any constitutional rule on the subject.
- No correlation was found between the intensity of constitutional commitments and the government expenditures for health care; although the constitution is seen as a source of protection. The degree of legal remedies as access to courts, and the opportunity to challenge policymakers who fail to enforce constitutional mandates vary also across countries. The main finding was that many developing countries lack financial resources to provide or improve health services (Kinney and Clark 2004:296).

³¹⁷ The decentralization of health services is part of this constitutional dimension when its design is included in the Constitution: when the service is decentralized, or when the private sector and civil society participate in the health service provision (Bolis 2003:4).

- Legal actions do not necessarily provide enough protection of individual rights and they are not the best option to obtain services implied by many ESC rights. When judges adjudicate in this sense, they become policymakers in an environment of scarcity (Kinney and Clark 2004:300). As a result, the authors recommended that policy imperatives created by the constitution and international human rights treaties may be used as standards to evaluate the performance of governments in the realization of the ESC rights. The degree of participation of the courts in providing “solutions” for governmental failures in the enforcement of these policies (Kinney and Clark 2004:301) may be based on the constitutional rules on legislative and administrative competences but budgetary restrictions determine the realization of a satisfactory level of health care.
- Measurements and technical comparison of health system performance sought to find a consensus on which services should be assured by national health systems (Kinney 2004:304).

5.2.3 Equity in Health reforms in Latin America

Health policy reforms in Latin America were mainly driven by equity considerations, not market imperfections (Jack 2000:44-5). Flores (2006) distinguished between different categories of equity goals of health policy reforms (table 5.1).

Table 5.1: Categories of equity goals and interventions³¹⁸

Equity goals	Barriers	Interventions
Category 1: Equity in access to health care services	Physical (distance, topography) Organizational (limited schedules at health facilities) Cultural (providers not acquainted with local culture and language)	Delivery of services through mobile teams (public providers or private under contract) Extending opening hours of health care facilities Service delivery by providers who speak local languages
Category 2: Equity in the utilization of health care services	Financial: User-fees in public facilities High cost of services in private clinics	Exemption mechanisms for poor/vulnerable users at public facilities Expansion of medical insurance
Category 3: Equity in resource allocation	Tendency by which central government favors urban centers and rich/influential territories with a higher allocation of public resources	Implementing progressive formulae to allocate resources Financial decentralization to local health authorities Return of infrastructure and financial resources to local governments
Category 4: Equity in the delivery of effective services	Tendency to deliver services of lower quality to poor/disenfranchised population groups	Accreditation and certification of public and private service providers
Category 5: Equity in the delivery of effective	Tendency by which new and effective interventions and/or services are delivered	Delivering interventions based on primary health care

³¹⁸ Other benchmarks of equity (fairness) to evaluate the reforms of the health sector were designed, based on the evaluation used in US. It was suggested that these could be applied in developing countries, but without going deeper into concrete cases (Daniels et al. 2000).

services	preferentially to population groups with more resources (due to cost and availability)	Delivering comprehensive services (beyond packages of basic services/prevention)
Category 6: Equity in health	Utilization of effective services in the reduction of inequities in health Other social determinants of health (education, employment, income etc.)	Implementation of interventions based on the model of primary health care Implementation of comprehensive and multi-sectoral interventions (health, education, employment etc.)

Source: Based on Flores (2006:9).

According to Flores, policy reforms in Latin America and the Caribbean have only addressed the first three of the above equity goals (table 5.2), although more recently Brazil, for example, has been implementing interventions aimed at categories 4 and 5 (Flores, 2006:11).

Table 5.2: Policy reforms and equity goals in Latin America, 1995-2005

Equity goal	Reform policies	Objective in relation to equity	Examples of countries implementing such policies
Category 1: Equity in access to health care services	Implementing mobile teams of possible private providers (under contract) or public providers to deliver basic packages of services	Improve access to basic packages of services by reducing physical barriers of population groups living further away from a network of health care facilities	Guatemala (private providers under contract) Costa Rica (public providers)
	Defining and implementing basic packages of services of universal access	Regulate universal access to a basic package of services within a medical insurance model	<i>Colombia</i> Mexico
Category 2: Equity in the utilization of health care services	Expanding medical insurance	Reduce financial barriers to service utilization by expanding private and public models of medical insurance	<i>Colombia</i> , Chile (managed competition model) Brazil (public insurance model)
	Granting autonomy to public health facilities	Expand user-fees in public hospitals. Revenue collected will subsidize services delivered to poor/vulnerable users	Peru Honduras
Category 3: Equity in resource allocation	Decentralizing financing	Improve resource allocation by transferring authority for resource allocation to local level authorities within the ministries of health	Guatemala Nicaragua
	Returning infrastructure and resources to local governments	Improve resource allocation, access and utilization by transferring infrastructure, financial and human resources to local governments	<i>Colombia</i> Chile Brazil

Source: Based on Flores (2006:11).

In Colombia, health sector reforms covered all three equity goals of table 5.2 (Flores, 2006). The reforms have been a combination of a provision of a basic (subsidized) package of services of universal access³¹⁹ and the expansion of medical insurance (similar to the model followed in Chile and Argentina).³²⁰ In Colombia, as in Chile, private insurers participate in the provision of obligatory risk pooling for the social security system (Schieber et al., 2006:238). Infrastructure and resources have been returned to local governments, as in Chile and Brazil. The Colombian model, combining the 'contributory' and the 'subsidized' regime, has been characterized as an implicit two-tiered voucher scheme, financed through a proportional wage tax (Jack, 2000:21-2). The discussion has been between those who defend the right to health as a fundamental principle (mainly lawyers) and those who consider health provision as a public policy (mainly economists, public health experts and politicians). This again shows the unavoidable link between the right to health and the financial resources to provide it (López 2008:5).

5.3 The Colombian regulatory framework

5.3.1 Constitutional regulation of the sector

Colombia has been developing a decentralized system of universal health coverage since 1991, when the P.C. included the right to health as a constitutional ESC right. Legal reforms aimed at putting in place a market-based scheme and at creating a competitive system that would supply efficient health services for the whole population. Before 1993, the Colombian health system was composed of three sectors: the public sector aimed at the population not included in the social security system and representing (at least theoretically) approximately 70% of the population; the social security system covered 15% of the population; and the remaining 15% of the population used private providers. The system was characterized by low levels of coverage and access to services; 45% of urban population and 80% of rural population did not belong to any insurance system (Escobar and Panopoulou 2003:657). The P.C./91 included specific rules on health provision:

- Rules concerning the special protection of the weak:
 - a. Right to health of *children* (44 and 50). Children younger than one year without any coverage from a health plan, have the right to free health care in all hospitals that receive subsidies from the State.

³¹⁹ The inclusion of informal sector workers and poor self-employed through subsidized schemes was also part of the reforms in Chile, Costa Rica and the Philippines (Schieber et al., 2006: 237).

³²⁰ The Chilean reforms took off in the 1980s. On Chile's mixed health system, see also, Barcia (2005).

b. The right to social security services to the *elderly* (including health) when they are in extreme poverty (45) and to the *disabled*, (who need specialized attention (47)).

- The right to social security is non-renounceable; the State and the private sector should extend the coverage in accordance with the legal regulations.³²¹ Resources from the social security system cannot be used for other purposes (48).
- The social security system is an obligatory “public service³²²”: health services (promotion, protection and recovery) have to be supplied under the regulation of the State. These regulations cover: i) the accomplishment of the principles of efficiency, universality and solidarity; ii) the regulation of health services provision by the private sector and the control and surveillance of the sector; iii) the definition of competences among the levels of government and the private sector; iv) the parameters to provide basic services (freely and compulsory) to the whole population³²³.
- Budgetary rules of the health sector: i) resources are earmarked for health care from public (financial) monopolies on hazard games, and partially from lotteries and liquors (336). ii) The national budget must include social expenditures whose components are defined by an organic law. These budget items have priority except in cases of war or for national security reasons. The investment budget of this item cannot be lower than the budget of the previous year, as a percentage of the total budget (350).³²⁴ iii) Health expenditure is a priority for territorial entities when programming and spending the intergovernmental transfers (356-7).

5.3.2 Legal regulation

Health sector reforms appeared as a conditionality of the IMF and World Bank lending policies. The main policies suggested by the World Bank were: decentralization, privatization and the improvement of “equity and allocative efficiency through guaranteeing universal access to a basic package of services, determined according to what each country could afford and based on cost-effectiveness principles. Governments and the rest of the population would subsidize the provision of the services included in the basic package to the indigent” (Homedes and Ugalde 2005:84). These policies were introduced by the World Development Report of 1993. Decentralization was implemented in almost all the Latin American countries, but Colombia

³²¹ Article 334 is complementary and states that economic interventions must try to assure that the whole population and particularly the poorest have real access to basic services.

³²² This term refers to the French concept of “service public”, later renamed as ‘public interest services’.

³²³ P.C. (365) regulates public services in general.

³²⁴ P.C. (366) complements these rules: the general welfare and the improvement of the quality-of-life of the population are the social goals of the State. It sought to solve unsatisfied needs in health, education, environmental protection and drinking water. For these purposes, social expenditure has priority in the development plans and public budgets.

is considered the state that applied the guidelines to improve universal coverage with the participation of private sector more rigorously (Homedes and Ugalde 2005:83-6). One of the main discussions on the design of the health system in Colombia is focused on the qualification of health as a good. Opinions range from those who defend the idea that health is a public good, to those who affirm that it is a private good, which determines the institutional design and the degree according to which a market (and price) logic should be applied to this sector (González 2000:43-5). Colombian regulators seem to be occupying an intermediary position, considering health as a merit good because its consumption is intrinsically desirable (Arias and Nuñez 2002:287). Multilateral banks recommend that legal reforms should aim at a competitive market-based scheme to supply efficient health services to the whole population. In contrast, the Constitutional Court seems to be closer to those who consider health as a public good. In practice, two legal reforms implemented the recommendations: the decentralization of competences and resources for health care (Law 715/03)³²⁵ and the reform of the health system to reach universal coverage (Law 100/93).

First, intergovernmental transfers finance vertically the provision of health and education services (mainly) through territorial entities, following policies decided at the national level; this is called the Revenue Sharing System since 2001 (SGP). Constitutional amendment (LA 01/01) and Law 715/01 implemented a scheme that corresponds more to a 'de-concentration' model than to a 'de-centralization' model because the main goal was not to transfer competences, but to diminish expenditures of the central government.³²⁶ In a way, it is argued that a de facto privatization occurs when the central government diminishes or suspends funding because the absence of public funding increases the fees for health provision paid by the population (Homedes and Ugalde 2005:87). Since the P.C., two legal reforms have further regulated the decentralization of resources and competences: Law 60/1993³²⁷ replaced by Law 715/03 which developed the constitutional amendment (L.A. 01/01). These reforms sought to diminish the transfers in real terms (i.e. as a percentage of the current revenues of the central government) and to flexibilize the use of these resources by territorial governments. They were one of the main goals of the Structural Adjustment.

Second, Law 100 /1993 sought universal coverage, solidarity and efficiency with quality. It introduced two regimes of affiliation: the contributory regime, covering people that are able to pay a monthly contribution,

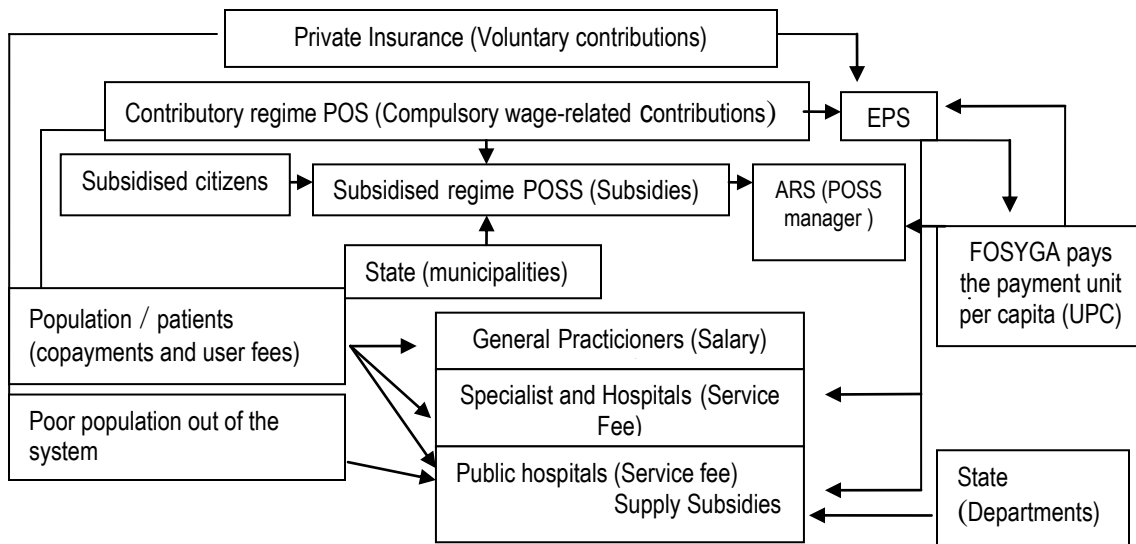
³²⁵ It reformed Law 60/1993; both developed the P.C. (356-7).

³²⁶ The IMF realized an analysis of the intergovernmental transfers following the P.C. (Ahmad and Baer 1997: 457-503).

³²⁷ For a discussion of the framework of this regulation, see: Lizarazo (2001:219-76).

and the subsidized regime, covering poor people.³²⁸ People that should be in the subsidized system, but are not (yet) can benefit from health services in public hospitals. The municipalities provide subsidies to their poorest population, whereas departments provide subsidies to public hospitals. Law 100/93 reformed also the system of subsidies: the demand side (poorest population) is privileged instead of the supply side (public hospitals). Public hospitals should act as any other health service provider seeking competitiveness and efficiency. The elimination of their subsidies was planned and their management was supposed to aim at technical and financial autonomy. They were forced to adopt the legal structure of a Social Enterprise of the State (ESE)³²⁹. The contributory regime is managed by the EPS and they offer the Obligatory Health Plan (POS). The subsidized regime is offered by the Subsidized Regime Administrating Enterprises (ARS) and they offer also the Obligatory Health Plan for this regime (POSS). At the national level, the Solidarity Fund (FOSYGA) plays the main role and manages the contributory and subsidized regime, the promotion of public health and the payment of health care in case of traffic accidents and catastrophic and terrorist events. The gap between the contributions of workers and the total expenditure of the health system is covered by the central government (Clavijo 2009:16).

Figure 5.1: The functioning of the Colombian health system, since 1993 ³³⁰



³²⁸ It is designed in a similar way as the American Medicaid: targeted programs with limited coverage (due to the scarcity of resources) and not constituting entitlements (Gaviria, Medina and Mejía 2005).

³²⁹ CONPES Document 3204/02 establishes the general framework for health service and gives priority to the modernization of public hospitals, even in a situation with public indebtedness with multilateral financial institutions (IDB).

³³⁰Based on Escobar and Panopoulou (2003:660). Another synthesis was presented by Barón (2007:55-87).

5.4 Evidence on the implementation of the reforms

Despite the figures that show Colombia as one of the best in Latin America, universal coverage is far from being achieved; failures of providers and of public resource allocation worsen the situation. The economic crisis at the end of the nineties contributed to the continuous and rising deficit of the health sector. Simultaneously, people suffered from the crisis (unemployment, recession) and demanded more help from the State to cover health expenditures. In addition, the lack of real enforcement of some legal reforms is also seen as responsible of increasing failures in health service provision. The reforms of the decentralization of health services (L.A. 01/01 and Law 715/2001), included in the first IMF arrangement, sought to improve the services provision and to diminish the burden of the (continuously increasing) transfers on the national budget. They were not enacted as suggested by the IMF but included a temporal solution to the budgetary burden (L.A. 01/01 in force until 2008). Therefore, the IMF asked a further reduction of the growing transfers (IMF C.R. 06/234)³³¹. The National Department of Planning (DNP) showed that despite the objective to reduce the SGP to avoid the budgetary crisis, health resources (which represent 24.5% of total SGP) have grown constantly in the period 2002-6 (table 5.3.). Some positive results of this reform highlighted are the reduction of the inequity gap in resource allocation between municipalities from highest and lowest income levels in the 1990s, and the correlated rise in public spending in the health sector (Castaño et al. 2001). However, delays in the SGP transfers partly caused by the complexity of the system of resource allocation (mainly by the enlargement of the coverage policy, the subsidized regime and the financing of public hospitals) together with the lack of clarity in the distribution of responsibilities among the levels of government have been signaled as the main problems of the system.

Table 5.3 SGP distribution in health (billion COP)

Year	Subsidized regime	Public Health	Supply subsidies	Total
2002	1.207.542	290.874	1.093.059	2.591.475
2003	1.453.555	337.649	1.243.177	3.034.382
2004	1.609.641	359.695	1.363.470	3.332.807
2005	1.765.826	379.758	1.440.908	3.586.493
2006	1.940.245	398.372	1.497.019	3.835.637

Source: Ministry of Social Protection, 2006³³²

³³¹ AL 04/07 reformed the P.C. (356-7) increasing annually the SGP in a percentage equal to the average of the percentage variation of the current revenues of the nation during the last four years, excluding temporary taxes created by states of siege. However, it established a temporary regime: in 2008-9 the SGP increase should be equal to the actual inflation plus a real growth rate of 4%. For 2010 the latter rate was 3.5%; in 2001 it was 6.3%.

³³² Slightly different figures were presented by DNP. http://www.planeacion.cundinamarca.gov.co/BancoMedios/Documentos%20PDF/sgp%20situaci%C3%B3n%20actual%20y%20reformas_08_01_2008.pdf (01.08.09)

The evaluation of Law 100/93 is more complex. In theory, universal coverage in health depends on the capacity to subsidize the part of the population unable to pay these services. Social security contributions were supposed to be sufficient to maintain the whole system and protect the right to health for everybody. But in practice, subsidies to the supply side continued, doubling the expenditures and affecting the coverage to the poorest population through the subsidized demand system and increasing the inefficiency of public hospitals³³³ (Acosta et al., 2005). The reason for this prolongation was to assist the poor outside the system; therefore, budgets of public hospitals grew simultaneously with the public expenditure earmarked for the subsidized regime.

According to international comparisons in the period 1993-7, medical insurance coverage in general, and of poor population groups specifically, was extended substantially in Colombia, more than in any other Latin American and Caribbean country. However, a number of concerns have been voiced (Flores 2006:13,21): i) the positive results in terms of coverage were achieved through a massive increase in health expenditure (from 4% of GDP in 1990 to 10,5% in 1998); ii) population groups have contributed differentially to health expenditure; iii) a substantial part of the poorest income groups are still not covered by medical insurance; iv) the service packages received by the population in subsidized and contributory systems, respectively, are differentiated; the former being approximately one fifth of the value of the latter. According to Jack (2000:25), the increase of health expenditure from 4% of GDP in 1990 to nearly 11% at the end of the 1990s, can be explained by the introduction of demand subsidies without the removal of supply subsidies.³³⁴

Another commitment in health policy is related to the upgrading of the national health accounts, necessary to evaluate the performance of the country. Colombia adopted the UN system (Barón 2007:33). In 2003, a revision of the national accounts was implemented following the recommendations formulated by the IMF in 2001, with the technical and financial support of the IDB (Barón 2007:45).

³³³ An analysis on the performance of public hospitals in Bogotá concluded that the weakness in the available data impeded the evaluation of the distribution of responsibilities among levels of government and the measurement of the impact of legal reforms (McPake et al. 2003:193). Some data show the financial problem: i) Before 1993, 44% of the population was treated by public hospitals, of which 15% of the subsidized regime continued to be treated by the public net and 29% passed to the private sector (Acosta et al., 2005). ii) The labor cost of public hospitals increased 40% since 1995 (Escobar and Panopoulou, 2003:672).

³³⁴ Schieber et al. (2006:239) also refer to health policy reforms leading to unsustainable levels of domestic resource mobilization to finance health needs in low and middle income countries. In addition, also in high income countries unsustainable subsidized health systems pose a challenge to policy-makers as Medicaid costs in the US have proven (Moncrieff 2006:673).

In practice, the contributive regime had a weaker than expected coverage (Gaviria, Medina and Mejía 2005:14-6; Acosta et al., 2005) and the economic crisis at the end of the nineties worsened the deficit of the sector³³⁵ which has been continuously growing. Administrative failures (i.e. a lack of a performing information system) and the APFR case law in health matters complicated the situation. The number of affiliated persons in the contributive regime decreased, whereas the informal labor market, unemployment and the moratorium in the payment of the monthly contributions increased. In 1999 30% of the population that should be beneficiary was not and 31% of the actual beneficiaries were not poor (González 2000, quoted by Homedes and Ugalde 2005:91). In 2001, 19.5 million people were not affiliated. Of these, 8.1 million were potential candidates for the subsidized regime, 2.5 million for the contributive regime, and 8.8 million were not classified as poor but they suffered income problems which impeded them to pay the contributions (Bitran et al. 2001; quoted by Acosta et al., 2005:43). In 2002, 18.6 million people did not belong to the social security system in health (Arias and Nuñez 2002:288-9) and most of the people that used APFR to obtain a health service did not belong to this category (García and Rodríguez 2001:436-8). As a consequence, the lack of resources may have hindered compliance with the contracts in force because allocated resources had to be used to accomplish the APFR rulings.³³⁶ In the crisis years, the use of the APFR was supposed to avoid the delay in the payments of the contributions by employers and to obtain health services avoiding social security contributions. In 2004 a study concluded that 69.3% of the APFR presented corresponded to citizens not included in the POS requiring health services. 16% required non-POS treatments of which 14.7% had not contributed the required minimum period to the system. More than 60% of the APFR was presented against private EPS (Salud Colombia 2004).

The figures presented by the government, corresponding to the post-crisis period, contradict previous results. The report indicated an extraordinary increase in coverage, but it points also to some failures in the collection of figures. A closer look shows that the increase is mainly due to the correction of the population figures (table 5.4). The system to select beneficiaries of the subsidized regime was analyzed in 2003. Some failures were found in the selection of the poorest families, but also some incentives in the allocation of subsidies were created to promote particular behaviors which impede to classify the beneficiaries in function of their payment capacity (Fresneda 2003:586).

³³⁵ Evasion in the contributory regime represented in 2000, 2.75 % of the GDP (Escobar and Panopoulou 2003:675).

³³⁶ Some rulings did not apply rules in force: SU819/99; SU562/99 (Restrepo 2003:202-8; López 2003:292-4; García and Uprimny 2002).

Table 5.4: Total number of affiliated persons in both (contributive and subsidized) regimes

Year	Contributive regime	Subsidized regime	Total affiliated	Total population	Coverage as %
2002	13.165.463	11.444.003	24.609.466	43.834.117	56,14%
2003	13.805.201	11.867.947	25.673.148	44.531.434	57,65%
2004	14.857.250	15.553.474	30.410.724	45.325.261	67,09%
2005	15.533.582	18.581.410 ³³⁷	34.114.992	41.242.948	82,72%
2006	16.029.505	20.107.223	36.136.728	42.888.592	84,26%

Source: Dane and Subsistema de Información del FOSYGA y BDUA³³⁸, quoted by the Ministry of Social Protection. Andi: Dirección General de Seguridad Económica y Pensiones, Dirección General de Gestión de la Demanda en Salud and website of DANE of 16.07.2008 (Total Population estimated on 30.07. 2008). Annual Report of CNSSS 2007-8 to Congress, p6.

5.5 The parameters of the IMF Structural Adjustment Arrangements

From the screening of the IMF Staff C.R. presented in chapter four³³⁹, the references to the health sector are outlined here to identify the proposed structural reforms and their relevance within the IMF arrangements. Table 5.5 synthesizes the relevant elements of the structural reforms analyzed in the C.R. (annex 4.2), indicating whether they were a performance criterion for the IMF (which reveals the importance of the measure for the fund) and whether they were concretized as a legal reform (which reveals the relevance for the state). The issues refer basically to the financial deterioration of the public health system, especially the ISS and the budgetary control of intergovernmental transfers (SGP).

First, concerning **the reform of the ISS**, although it was not part of the preliminary letter of intent of the EFF (only since C.R.1/12), it was practically a permanent issue in the first two arrangements. It appeared as structural benchmark in the penultimate C.R. of the EFF arrangement and its accomplishment was reported in the last report of the first Stand-by arrangement. The financial crisis of public hospitals was addressed in two C.R. in 2002 and 2003, but without performance criteria.

In 2001, the imminent restructuring of the ISS was presented as a solution to the serious fiscal constraint. The IMF pointed out that some Court rulings since as early as 1996 (CR 01/168) were one of the causes of this problem. Whereas in 2001 the measures were still mostly taken through executive regulations, in 2002 a legal reform was presented, but to be developed through legislative delegation. These measures divided

³³⁷ At the end of 2005 16.483.662 were full subsidies and 2.097.748 partial subsidies.

³³⁸ In 2005, active and suspended affiliates were included. Dirección General de Seguridad Económica y Pensiones and Dirección General de Gestión de la Demanda en Salud Corte Contributivo y Subsidiado 31/12/05. Partial subsidies were included.

³³⁹ Annex 4.2 schematized the reforms proposed and its corresponding evolution during the three arrangements.

the different functions of the ISS to diminish costs and make public hospitals competitive. **C.R. 01/12** mentioned for the first time the need to restructure the provision of health services due to the financial deterioration of the health system under the ISS. The government was committed to present proposals to be discussed in the second review of the program (Point 26.) **C.R. 01/64** highlighted that those measures aiming at an organizational reform of the ISS would encourage the control over public expenditure, but would particularly improve the finances of the ISS health service, which showed a rapid financial deterioration due to increasing costs (Executive summary and point 28). The aim was to eliminate the cash deficit of the ISS health system in the medium term (Point 38).

C.R. 02/15 presented the rising costs of the public health system together with the growing purchases of security equipment as causes of the non accomplishment of the Non financial Public Sector (NFPS) spending program which exceeded by 0.5 percent of GDP in 2001 (Point 10). The ISS health service reform initiated in 2001 had to restructure the debt of health service providers, renegotiate the collective bargaining agreement with health workers, lift the ban on increasing the number of affiliates in the ISS health Plan, and regulate new ways to finance the costs of medical treatments. These measures were supposed to save 0.2 % of GDP annually (Point 34).

C.R. 03/19 again presented the cost overruns by the ISS health service as one of the major causes of the adverse economic situation (point 3), and therefore, the reform plan of the public health service was necessary because of its deficit in 2002, despite the measures taken to reduce operating costs (Point 23 and page 71). The approval by CONPES of a financial sustainability plan for the ISS health service was proposed as a structural benchmark. It sought to eliminate the fiscal deficit by 2007, needed to safeguard the medium term fiscal consolidation. **C.R. 03/181** recognized that the ISS restructuring program designed and approved by the CONPES in 2003 was complemented with a financial plan to obtain additional resources to fund the public health system and the public hospital network. For these proposals a credit with the IDB was concluded to make public hospitals financially viable by 2007. This restructuring program was presented as possibly inconvenient with respect to the targets of the CPS deficit (point 19), but nevertheless it was expected to result in clear fiscal savings in the medium term (17-9).

C.R. 04/15 reported that the cost of restructuring the public health service was included in the 2004 budget, which was reported as being executed as planned (7 and 10). **C.R. 05/154** included as structural

benchmarks for 2005 an additional evaluation of D1750/03 (which split the former ISS and created new 'Social Enterprises of the State' (ESE) to provide health services) and the full implementation of the CONPES plan to eliminate the ISS deficit by 2007 (57). **C.R 05/1540** mentioned as achievements of the government the reform of the ISS labor regime, as well as the restructuring of public hospitals and clinics (47). No more references to the issue were found in the C.R corresponding to the second Stand-By arrangement, which analyzed the accomplishment of the structural benchmarks proposed in the final revision of the first Stand-by arrangement.

Second, **the reform of the system of intergovernmental transfers** (hereinafter –SGP- Sistema General de Participaciones) was the second health issue included in the IMF arrangements. Although it is mentioned as a fiscal decentralization item, it was included here because it refers to public resources transferred from the central government to territorial entities, earmarked for health and education. Only those aspects and case law referring to health issues were considered; the educational sector was omitted because it was not included in the IMF structural programs. The main proposition of the IMF was the control of the transfers, through their freezing in real terms, seeking to stop their unsustainable evolution from a fiscal point of view. The reasons were basically that, on the one hand, the central government continued with a vast quantity of its original spending responsibilities, while on the other, the SGP were constantly rising. It was a permanent issue during the three arrangements seeking legal reform to improve the standards for the use of these resources by territorial entities. The constitutional design of the intergovernmental transfers was again mentioned in the third arrangement, and classified as a non-accomplished structural benchmark. The IMF considered as a commitment the submission of the constitutional reform to the Congress, but it was approved after the observation period. The following paragraphs summarized the treatment of SGP in the C.R.'s.

C.R 99/149 proposed the freezing of intergovernmental transfers to reduce the NFPS deficit of 2000 (Point 22). The IMF classified this reform as a prior action of the EFF arrangement. **C.R 00/12** (statistical appendix) highlighted the earmarking of public revenues as one of the major endemic problems of the public finances. Constitutional regulation of the SGP was accused of increasing the complexity of fiscal management, because the central government was left with the spending responsibilities while intergovernmental transfers were increasing constantly (Point 2).

C.R 01/12 evaluated the reform of intergovernmental transfers approved by the Congress as a way to ease the public deficit control (20-1). However, the reform presented by the government was not as suggested by the IMF because it proposed an annual increase of 1.5 percent in real terms according to the population growth and the freezing of the SGP in real terms at 46.5 % of the current revenues of the central government in 2001. **C.R 01/64** mentioned the submission of a bill to the Congress to improve the parameters of control for the use of the SGP by territorial entities. The aim was to increase the efficiency of resource allocation to improve the provision of these social services (20). **C.R 02/15** clarified that this legal reform which would develop the constitutional amendment would ease and improve the control of the SGP. As objectives of the reform were mentioned the efficiency in the allocation of resources and the assurance of a better service and coverage, but the provision of fiscal savings was not expected (15-6 and 62).

In **C.R 03/19** the IMF criticized that the constitutional reform of the transfers allowed a growth of about 2 % per year in real terms for 2002-5 and 2.5 percent for 2006-8 and hence it would not be as useful as planned to control the fiscal deficit (72). The IMF proposed in **C.R 04/199** the strengthening of the fiscal decentralization through the cooperation of the FAD, who identified some difficulties: (i) the expenditure responsibilities of the different levels of government were unclear and sometimes spending was duplicated. (ii) The SGP (5.8 % of GDP in 2003) was a disincentive for territorial tax collection. (iii) The SGP was largely earmarked, which complicated the spending competences of territorial governments. The FAD recommended: (i) to fortify the institutions through the creation of “a central authority to coordinate all decentralization issues”; “congressional committees” to further strengthen decentralization and increase the “information, control and audit systems” of territorial entities. (ii) To “improve local revenues” and increase the efficiency in their collection. (iii) To simplify the system of SGP privileging the flexibility in expenditure responsibilities and de-linking them from the amount of national revenues. (iv) To improve macroeconomic coordination between territorial entities, fiscal targets and the “overall public sector deficit” (15-6).

C.R 05/1540 highlighted that in 2009 the regulation included in the transitory constitutional reform ended and that the situation of the SGP would become as in 2002, increasing the fiscal deficit of the central government. Therefore, the IMF recommended a new reform, but for the government it was too soon to submit it to the Congress and therefore it proposed to prepare a study evaluating the existing mechanism. The FAD mission presented recommendations on fiscal decentralization management (10-2). **C.R 05/392** highlighted that the SGP was a challenge for the fiscal sustainability and the IMF staff recommended

preparing a reform to be presented by the next government (11 and 20). “The publication of a report that evaluates the current system of revenue sharing” was included as structural benchmark (45).

C.R 06/234 mentioned as a structural benchmark a constitutional reform by August 2006 to control the growth of the SGP seeking to avoid a rise of the fiscal deficit. The government proposed a growth similar to the population growth to warrant a global coverage (19). These transfers represented 4.9% of the GDP in 2005 (less than in 2003) and the territorial level would manage 40 % of the public expenditure. The government proposed as a reform to keep a growth of 2.5% in real terms, disconnecting it from the current national revenue but seeking in any case to realize the Millennium Development Goals (20). The IMF judged this reform as crucial and proposed as a structural condition the submission of a constitutional amendment to reform the SGP by August 2006 (25-6 and 52). This reform was selected to be submitted in case the President would win the elections (p. 54). The last report, **C.R 06/408**, reported the submission of the reform to the Congress (4) and the IMF accepted this as a conditionality being met, without mentioning about the actual enactment (18). In the last evaluation of the government, it highlighted as an achievement of the whole adjustment program, the constitutional reform of 2001, it signaled that territorial entities ran a surplus since 2004 and the mentioned broadening of health coverage (11-2).

Third, **the reform of the financial monopoly of the national lottery and hazard games** was included in the first three C.R. until the enactment of Law 643/01, without any analysis of its relevance and impact on the adjustment. This issue is included here because the P.C. earmarked the resources of those activities, developed under the control of the departments, for the health sector. This issue seems to be one of the reforms included by the government which did not have any direct relation with the structural adjustment program, as explained in chapter three. **C.R 01/64** mentioned the enactment of this statute as an achievement of the structural program (point 13).

Table 5.5 Provisions related to the health system included in the IMF Country reports.

Country report	C.R. 99/149	C.R. 01/12	C.R. 01/64	C.R. 01/68	C.R. 02/15	C.R. 03/19	C.R. 03/181	C.R. 04/15	C.R. 04/199	C.R. 05/154(0)	C.R. 05/392	C.R. 06/234	C.R. 06/408
Structural reform													
Health reform in general						X	X	X		A			
Reform of the ISS health service		X	X		SB	SB	A			SB			
Additional resources to fund the public health system and public hospital network					X		X						

restructuring													
Broadening the coverage of health, education and other social programs													X
Constitutional amendment to freeze the SGP	PA	X			X	A ³⁴⁰				X	SB	SB	X
Reform of the national lottery and gaming activities	X	X	A										
Bill to set stricter standards for the use of the shared revenue funds earmarked for the provision of health and education			X		SB			X	X				

Source Annex 5.2 and Source: <http://www.imf.org/external/country/COL/index.htm>

X: analyzed in the C.R. SB: structural benchmark; A: accomplished. PA: prior action. : legal reform

The coverage of the health service and the situation of the poor were only mentioned twice in the whole series of C.R. of the three arrangements. First, **C.R 99/149** noted that to diminish the impact of the recession on the most vulnerable groups, the social safety net program would be of particular importance (equal to 0.3 % of GDP) as well as the purpose to increase the enrolment of the elderly in the health insurance system (Point 21). Those topics were not further developed by the IMF. Second, **C.R 05/1540** explained that a big part of social spending was allocated to subsidies focused on sectors as health and that they had benefited the poor; whereas other subsidies assigned to the “tertiary education and housing” would probably rather benefit the middle and upper classes. As a result, it recommended allocating subsidies more to reduce poverty, seeking to accomplish the Millennium Development Goals (9).

Finally, **C.R 01/68** quoted some rulings of the Constitutional Court, accused of perturbing the health financing policy (12-3). Those rulings refer mainly to laws enacted before the outset of the IMF programs and therefore they are not part of the set of rulings developed below:

- C579/96 struck down L100/93 (235) and DL 1651/77 (3). The challenged articles referred to the type of labor regime that ISS’ employees have. The court ruled that all the employees (except those of ‘direction and confidence’) should have a contractual relation and, as a consequence, all the labor rights should be guaranteed. The ruling was based on the violation of the right to equal treatment (P.C. (13)). The IMF considered that this sentence conferred those employees the right to collective bargaining along the lines of the employees of public enterprises, which mainly implied generous wage negotiations. Therefore, the ruling would impede the ISS to compete with the private sector. Provided that it might be a precedent of sentences analyzing the ISS restructuring, it was included in the judicial review case law analysis.

³⁴⁰ Approved but not as suggested by the IMF

- C1165/00 struck down Law 344/96 (34) which reformed Law 100/93. This ruling prohibited the central government to slowdown transfers to a subsidized health plan for people outside the labor market. The ruling used a “systematic and teleological” interpretation, based on general constitutional principles and the international treaties on ESC rights approved by Colombia. But particularly, it was based on the P.C. (48, 350 and 366) which orders a progressive increase in the coverage of social security in the area of health, and prohibits the decrease of public expenditure allocated to social expenditure, which would impede the universal coverage in health. This ruling is signaled by the Court as one of the examples of its defense of social public expenditure (cf. analysis of C 791/02).
- C557/00 struck down L508/99 (National Development Plan). This ruling, although striking down a law included in the structural reform program, was not further analyzed because it was based exclusively on formal arguments. For the IMF, this ruling froze some non-specified projects, which is a vague opinion because it refers to the whole public investment program of a presidential period.

5.6 The interaction between the IMF, the regulators and the Constitutional Court

The financial deficit of the health sector and its lack of institutional capacity are arguments presented by the government and the IMF as obstacles to the systematic efforts to improve the efficiency of the sector. The measures adopted by the structural reforms focused on solving short term distresses caused by the (financial) deficit of the sector rather than on gradually improving the quality and coverage of the health sector. The Court in turn was focused on health-related problems of individual citizens (the ‘service deficit’ or the individual approach). This already points to the possibility of conflict between the two approaches but, above all, it shows the absence of a macro-perspective on general public policies, oriented towards the advancement of general welfare for all citizens.

In this section, the interaction of the Constitutional Court case law and the IMF structural reforms was developed. Following the scheme of the previous section, a new revision of the reforms enacted during the term of the IMF arrangements and of the corresponding sentences of the Court was performed to identify those issues developed by the IMF (intergovernmental transfers, the restructuring of the ISS health services and financial monopoly of hazard games). In addition, to the constitutional reform and the four statutes referred to in chapter 4, other statutes were included because, although they refer to issues such as budget management of restructuring, and were therefore included in these sectors in the jurimetric analysis, they include structural reforms of the health sector analyzed in the IMF C.R. One statute

classified in the budget management sector (Law 617/00) sought to control public expenditures of territorial entities and included rules on the SGP and one legal reform, by legislative delegation, included in the modernization of the state, regulated the ISS restructuring.

Table 5.6 shows the Court rulings that may have affected the structural reforms of the IMF, i.e. those rulings striking down or conditioning the constitutionality of legal reforms in the health sector. Rulings were grouped by issue as analyzed by the IMF. One sentence referred to the participation of the private sector in the administration of the financial monopoly of hazard games (Law 643/01), eight referred to the legal reform developing the constitutional reform of SGP (Law 715/01), three referred to the budgetary autonomy of territorial entities to manage the SGP and health resources (Law 617/00), and four referred to the reform of the ISS health services (DL1750/03).

Table 5.6 Legal reforms developed under the structural programs supported by the IMF, possibly affected by the Constitutional Court case-law.

Reform	Sentence	Reporting Justice	Art #	D	Topic	Articles of the P.C.
L643/01	C316/03	Córdoba	6	U	The financial monopoly cannot be operated by mixed corporations	336
L715/01	C615/02	Monroy	65	U	Limits to the intervention of the private sector in the health provision through the biannual plan of investment in health.	333, 334.366
	C617/02	Beltrán - Córdoba	57	U	Regulation of the control of resources allocated to health	211, 123, 189.
			60	Cond	Financing of Territorial Health Directions Current expenditures.	
			64	Cond	Transfer of SGP directly to EPS and IPS when Territorial Entities do not comply legal duties	
			72	U	Competences of the executive to regulate inspection and surveillance of health sector	150
	C791/02	Montealegre	46	Cond	The transfer of competences of promotion and prevention of health from the ARS to TE. Health services as economic activity	356
	C974/02	Escobar	54	U	Limits to the intervention of the executive in the provision of health services	333, 334, 150.
	C005/03	Barrera	106	U	Law 643/01 (9) cannot be reformed by this law (procedural reasons)	336.
	C097/03	Cepeda	111	U	Delegation of legislative competences to organize the system of control, inspection and surveillance.	150
	C566/03	Tafur	91	Cond	Prohibition of the embargo of resources of the SGP	356
	C568/04	Cepeda	64	U	Budget procedure to transfer SGP resources	356-7
Other statutes classified in other sectors but mentioned by the IMF						
L617/00	C540/01	Córdoba	14	U	Prohibition of transfers to EPS and other ECIE	1, 2, 49, 209
	C579/01	Montealegre	3	U, cond	Budgetary autonomy of territorial entities.	356, 362.

	C837/01	Araujo	52, 56, 90	U	Budgetary autonomy of Bogota D.C in health matters	362 ,336.
D1750/03	C314/04	Monroy	18	U, cond	Division of the ISS. Labor regime	53
	C349/04	Monroy	17,18	Cond	ISS. Pension regime. Retroactive effects of the sentence	53
	C559/04	Tafur and Beltrán	16	C	Social security organization and division of entities	1, 2, 13, 48, 49, 56, 210.

Source: Annexes 3.1., 3.2 and <http://www.secretariasenado.gov.co/leyes> **D:** Decision; **C:** constitutional; **U:** unconstitutional³⁴¹; **cond:** conditioned; **P.C. #:** P.C. Articles considered by the Court.

The sentences were analyzed following the scheme explained in chapter one, with the aim to identify the arguments used by the Court in their legal reasoning rather than taking part in the discussion on the contents of the reform. The work was particularly difficult because of the extension of the rulings. To identify the reasoning of the court all rhetoric forms (adjectives and style forms) were eliminated as well as the repetitive quotation of the constitutional and legal norms. Quotations of case law were also eliminated (leaving the citation and the main argument of the quoted ruling). After this exercise the size reduced considerably, and then repetitive arguments were synthesized.

Interventions of the Ministries (particularly those involved in the structural adjustment) were considered because they reflect the action of the government, the judicial analysis of the structural reforms, and allow measuring the importance given by the Court to arguments based on IMF arrangements³⁴². Only dissenting and concurring opinions referring to the norms declared as unconstitutional or conditioning the constitutionality were considered, and among them, those that highlighted the role of the structural reforms were particularly taken into account.

Before analyzing the case law in detail, some preliminary general comments can be put forward: i) The style (which includes the size, the number and form of quotations, citation, the use of footnotes etc.) and method used apparently depends on the justice, rather than on the Court as a group. ii) The method employed it is the entire discretion of the reporting justice. iii) The use of the term “reasonability and proportionality” is a common place whose scope depends on the understanding of the reporting justice. iv) The opinion of the Public Ministry (obligatory in all judicial reviews) is not binding for the Court, nor does it seem to have a high impact on the rulings; some justices gave a larger space to his concepts than others, who only mention his conclusions.

³⁴¹ The decision of unconstitutionality or the conditioned constitutionality does not cover all the articles.

³⁴² The underlying interest in the interventions from private actors was difficult to identify, and they were therefore omitted.

Based on the jurimetric analysis, it is remarkable that despite the protection of the right to health by the APFR case law, in the judicial review case law the right to health is not the main basis of its argumentation when it analyzed structural reforms. The use of rules of the constitutional economic regime is remarkable, being of particular importance, the arguments based on the violation of the freedom of enterprise. In second place the unconstitutionality was based on procedural reasons (failures in the executive or legislative process) and only in third place came fundamental rights and general principles. When the Court analyzed reforms enacted by Law 617/00 (Budget Management) their arguments were mainly based on the constitutional economic regime and in second and third place came, with similar importance, rules on the territorial organization and the executive. By contrast, when the reform of the structure of the ISS was analyzed (Modernization of the State), the Court based its arguments basically on fundamental rights, constitutional labor rights and general principles. Table 5.7 presents the arguments used by the Court to strike down or to condition the constitutionality of the reforms in this sector.

Table 5.7 Arguments used by the Court to strike down or to condition the constitutionality of structural reforms in this sector (in percentage).

P.C. Title	Health (%)	Law 617/00 (%)	ISS restructuring (%)
Title I Preamble Fundamental Principles	2		18
Title II Fundamental Rights	15		50
Title IV: Democratic participation	2		
Title V Organization of the State	15		18
Title VI Legislative	17	8	
Title VII The Executive	10	17	9
Title X Control Organisms	5		
Title XI Territorial Organization		17	
Title XII Economic Regime	34	58	

Source: Annex 4.7

The first group is composed of rulings referring to health resources included in Law 617/00, which sought to rationalize the finances of territorial entities. In the jurimetric analysis (chapter 4) this law was included in the management of public expenditure category because it was the central issue there. However, three sentences analyzed regulations affecting the financing of the health sector: C540/01, C579/01 and C837/01. They referred to the fiscal restructuring and financial recovery of local governments, which was generally accepted by the Court as a valid purpose of the law.

Sentence **C540/01** referred to the prohibition for territorial entities to transfer resources that were not authorized by law or to provide credits to public enterprises or enterprises with majoritarian participation of the State that execute financial monopolies, to EPS or to financial institutions. Law 617/00 authorized their liquidation when they are not efficient (and defined the criteria to evaluate efficiency). The Ministry of Finance and the Public Ministry defended the rule because it was the result of a discretionary competence of the legislator.

It is highly remarkable that the Constitutional Court used the purposive method. Its legal reasoning was based on the purposes of the norms and those of the involved institutions (financial monopolies, Commercial and Industrial Corporations of the State (ECIE) and the provision of health services by EPS). Those purposes were found basically in the text of the P.C. and the statutes. Constitutional case law was quoted to reinforce their arguments, although those rulings were not precedents (the dictum was mainly quoted). Without other legal reasoning, the Court concluded that the norm is neither arbitrary, nor unreasonable and the law was upheld except for the part of the transfers to EPS which was struck down. Because of the purpose of the EPS, being the generation of social benefit and not the generation of profits, the P.C. (1, 2 and 49) prohibits the application of the criteria of efficiency in the same way as to other commercial corporations. Notwithstanding, those enterprises have the constitutional duties (209 P.C.) included as principles of the administrative function.

A first dissenting opinion considered that the norm is “a disproportionate and unreasonable intervention in the autonomous nucleus of the competences of territorial entities to create enterprises (P.C. 300,305) and should have been declared as unconstitutional; a second dissenting opinion summarized the exposition of motivations of the statute (legislative antecedent) that explicitly presented the structural reform proposed by the government to control the territorial fiscal management. However, this presentation was used to argue a procedural failure in the legislative procedure (157 P.C.) and not to present a debate on the contents of the fiscal adjustment.

Ruling **C579/01** referred to Law 617/00 (3) on the financing of current expenditures (integral funding of ordinary services of the administration (P.C. 351)) of territorial entities, and prohibited its financing with the SGP, assets, investment, securitization of rents and revenue of selling fixed assets. The Ministry of Finance based its intervention on the legislative antecedents which was “technically supported” by the critical

situation of the finances of territorial entities that would affect the macroeconomic policies. This situation justified “the rationality and proportionality “of the measures, because as numerous constitutional case law affirmed, the autonomy of territorial entities to manage their own resources may be limited to protect the macroeconomic stability of the state. The legal reasoning of the Court presented first an extended evolution of the concepts of the unitary state and territorial autonomy based on case law from 1995-6. Second, based on its own case law, it recognized larger legislative competences in financial and budgetary issues when “the reasonability and proportionality of each concrete measure” is demonstrated and concluded that the limits of the intervention are set by the particular circumstances which determine the reasonability and proportionality of the norms. Third, it presented the constitutional doctrine (case law) on the limits of legislative intervention in budgetary issues of territorial entities. Fourth, it analyzed the reasonability and proportionality of the challenged rule, transcribing textually the measures. Fifth, after summarizing the macroeconomic and legislative antecedents of the norm, it accepted the interventions and the legislative antecedents as a proof of the macroeconomic crisis of local finances. The Court concluded that the measures were reasonable because they attacked the cause of the problem and that they were an effective way to reach the goals of the norm; they were proportional because they did not discriminate any territorial entity, and in case of damage it had to be discussed in other tribunals. The P.C. (356), referring to the SGP, did not clarify whether the SGP for health and education may be used for current expenditure or for investment. Concerning the other resources mentioned, the measure was considered as “too strict and not proportional” because it limited the own resources of territorial entities protected by the P.C. (362). The conclusion counted only two paragraphs after a lengthy doctrinal exposition.³⁴³

Three dissenting votes were presented; the first argued that the rationing of public expenditures cannot be unconstitutional (based on past case law) and “the special circumstances of macroeconomic difficulties made that the test of proportionality was easily approved”; the prohibition was thus reasonable because the rule sought to coordinate the level of expenditures of territorial entities with their level of revenues. The second affirmed that the central argument of the ruling recognized legislative competences to intervene in the fiscal management of the own resources of territorial entities, protected by the P.C. (362), to preserve the macroeconomic stability, when the intervention is reasonable and proportional. The reason for the unconstitutionality was insufficient to declare the rule disproportionate because following the reasoning of

³⁴³ The reporting justice used a rhetoric style with very long quotations (some of them irrelevant) which made it sometimes difficult to follow the legal reasoning of the Court.

the Court, it should be concluded that endogenous resources of territorial entities protected by the P.C. (362) are not absolute and should respect the law as the ruling affirmed (p85(v)). The third dissenting opinion joined the second by adding that the ruling was not consistent with the theoretical framework used to decide. The Court balanced the facts that served as motivation of the law but contrary to this analysis, it struck down part of the rule based on the P.C. (362), precisely the article that justified the intervention.

Ruling **C837/01** referred to the previous two cases, but applied to the Capital District of Bogota. The two rulings were extensively quoted to accept *a res judicata* to protect legal certainty. Two concurring votes and four dissenting opinions quoted those presented in previous rulings.

This group of rulings notoriously recognized the relevance of the principle of “macroeconomic stability”, always finding constitutional rules and case law to justify the arguments used. The arguments of the government (Ministry of Finance and DNP) were mainly based on the legislative antecedents which seem to be identified with the legislative purpose (the protection of the macroeconomic stability). Constitutional case law (which is not a strict precedent) was used to validate larger legislative competences vis-à-vis the autonomy of territorial entities. The Court used as main argument the purpose of the rule, or focused on the reasonability and proportionality of the law, mainly supported by its own case law. One of the rulings struck down the norm because the regulations were too strict and not proportional. Although it is supposed to apply the reasonability and proportionality test, its application was not transparent; on the one hand, discretionary competences of the legislative seemed to be accepted, but on the other hand the definition of a rule as reasonable and proportional seemed to be a discretionary decision of the Court. The quotations were extensive and in some cases they could well be summarized, leading to better texts. Legislative antecedents (exposition of motivations) were the main way to find the purpose of the law, although a textual reading of the P.C. was also used, but it was considered of less relevance. The macroeconomic stability was recognized as a valid principle by the Court. Dissenting opinions basically referred to the considerations of reasonability and proportionality of the measures. The relevance of macroeconomic stability was not discussed and it was quoted only to claim a procedural failure, as occurred in C579/01 where two dissenting opinions showed the contradiction in the reasoning. From the point of view of the structural reforms, these rulings eliminated the prohibition to transfer resources of the central government of territorial entities to their EPS with a deficit. They limited also the financing of current expenditures of

territorial entities with the SGP and other own resources. These changes may have perturbed the rationalization and the fiscal control of territorial entities.

The second group of rulings struck down part of Law 715/01 or conditioned its constitutionality. This statute developed LA01/01 which reformed the constitutional system of intergovernmental transfers (SGP). The norms affected by the rulings referred basically to the limitations imposed on the private sector that participates in the health service provision (C615/02 and C974/01), the delegation of legislative competences to regulate the control and surveillance of the sector (C617/02 and C097/03) and budgetary issues of the SGP transfers (C791/02, C566/03 and C568/04).

C615/02 analyzed Law 715/01 (65) on the regulation of the biannual investment plans in health realized by the territorial entities and approved by the Ministry of Health. They are investment plans in areas defined by the Ministry as being of “special supply control” and sanctions were established to public and private institutions that invest outside these plans. The challenge argued that the norm obstructed the free competition among private enterprises that provide health services because the Ministry had a discretionary competence to define which areas were under “special control”. Interventions of the Ministries of Health and Finances, together with an intervention of a citizen presented similar arguments: i) the State may intervene in the provision of health services and the private sector may participate (P.C. (365-6 and 48-9) and constitutional case law on Law 100/93); ii) Law 715/01 is a “deep” intervention based on the P.C. that regulates the intervention of the state in the economy and the control of public services; iii) the finality of the rule was to organize the service in a efficient and rational way to warrant the general interest and fundamental rights; the limitation of the private initiative is justified. ACEMI (Association of EPS) supported the challenge based on constitutional case law that protects the participation of the private sector in health provision: the freedom of enterprise and the principles of human dignity and the social security were violated because universal coverage was obstructed. The intervention was unreasonable and disproportional. Although the Public Ministry justified the intervention, he rejected the restriction to the exercise of professions linked to the health service, which is only possible for reasons of general interest and respecting the criteria of “reasonability and proportionality”. The norm did not present the reasons that justify the limitations as requested by the P.C. (334, 150(21)) and therefore, the test of reasonability and proportionality could not be realized. The sanctions should only be used exceptionally for criminal actions.

The legal reasoning of the Court was centered on the scope of the intervention of the state in the economy. First, it summarized largely the constitutional case law on the right to health, quoting many APFR rulings. The Court also quoted both APFR and judicial review case law referring to economic freedom, the freedom of enterprise and free competition in social security health matters. The Court highlighted the relevance of the freedom of enterprise as “motor of development” independently of the “economic approaches”. It further accepted as support of the legislative purpose, the legislative antecedents which expressed as purpose to overcome the problems of past regulation of the SGP distribution. After these lengthy quotations of norms and case law, the Court analyzed the concrete case. Based on the constitutionality of the legislative purposes, on the legislative antecedents and on the context of the law, the Court concluded that the purpose was to rationalize the supply and to avoid the concentration of investment in specific places, and the insufficiency in others. However, the test of proportionality was not approved (the ruling defined the test of proportionality, however) because free competition was eliminated, thereby affecting the principle of freedom of enterprise. In fact, the rule prohibited private enterprises to invest or offer services outside governmental planning, and established as a sanction the impossibility to be contracted with resources of the social security system. Discretionary competences of the Ministry were considered disproportionate, and therefore the unconstitutionality was unanimously declared.

C 974/01 analyzed Law 715/01 (54) referring to the authorization provided by the Ministry of Health to health sector hospitals (IPS) to realize investment projects for services and infrastructure in areas “of special control”. The challenge argued that the limitation of the economic freedom should be regulated by law (150(21), 333-4 P.C.) and quoted constitutional case law (particularly C615/02). The Ministry of Health defended the rule because it rationalized and planned the social economy to warrant the access to health services, and this purpose justified the limitation to the private initiative. The Public Ministry based its arguments on the legislative antecedents to justify the control of supply, but claimed that this is a legislative competence that cannot be delegated as a discretionary competence to the executive. The legal reasoning of the Court was centered on the violation of the legislative competences that the P.C. (150(21)) requires to limit the economic freedom. The Court explained first the constitutional regime of social security in health (based on the text of the P.C.) and then the system of free competition in the health sector, based on constitutional case law. It argued that the criteria of proportionality and reasonability should protect the general interest, the solidarity principle and economic freedom, as established by the judicial review and the APFR case law. Finally, it accepted the interveners’ argument that the P.C. requires a minimum of

legislative parameters to intervene in private activities. Their bases were the P.C. and international legal theory (Spain). The concrete case analysis was well developed, based on past constitutional case law and the text of the P.C. The Court accepted the legislative purpose but the norm was struck down. First, because the principle of exclusive legislative competence with respect to the intervention of the state was violated (the law did not establish the characteristics and objectives of supply control), it quoted international legal theory (Spain). Second, because it was not proportional and reasonable, as it eliminated the free allocation of resources in a system of free competition, affecting the freedom of enterprise in the health sector which is constitutionally protected (C615/02). Finally, it widely explained that the purposes of Law 715/01 sought the efficient allocation of public resources, which made the limitation reasonable. It accepted that decisions about resource allocation are political and accepted also the legislative antecedents of the rule. It concluded that due to the fiscal crisis of territorial entities this limitation was acceptable for public entities but not for the private sector, which works under the market laws.

C617/01 referred to Law 715/01 (57, 60, 64, 72) and **C097/02** referred to Law 715/01 (111). Both alluded to the regulation of the administrative function of control, surveillance and inspection of the health sector. They were centered on the organization and structure of the state. The first sentence analyzed whether the government is allowed to regulate by decree the competences to exercise the control, surveillance and inspection of the health sector, as well as the prohibition to delegate those competences to the private sector. The rulings were based on constitutional case law and the text of the P.C. The second sentence analyzed the delegation of extraordinary legislative competences to the executive to “organize a system of inspection, control and surveillance adaptable to the types of institutions and regions” that would manage the SGP, which appeared in the IMF C.R. It struck down those competences because the delegation lacked a “strictly restrictive criterion” to guide the executive. The ruling referred extensively to the constitutional history of the delegation of legislative competences and included several quotations of the regulation in European countries and the US. Those quotations seemed not directly related to the concrete case which was decided because the norm was “vague” and its finality was not clearly expressed.

Sentence **C791/02** conditioned the constitutionality of law 715/01 (46) on the transfer of competences of health prevention and promotion (part of the POSS) from the ARS to territorial entities. The challenge

argued the violation of the principle of reserve of the law (150(21) P.C.)³⁴⁴ because the economic freedom of ARS was limited by the National Council of the Social Security System in Health (CNSSSS) without legal parameters and without determining a compensation (336 P.C.). The service provision (48 P.C.) and the right to free competition (333-4 P.C.) were affected and the test of reasonability and proportionality was not approved. The Ministry of Health, based on the case law, defended the purpose of the rule: the rationalization of the social economy and the improvement of community services. The Public Ministry argued that those resources were payroll taxes and therefore the freedom of enterprise was not limited and the compensation did not apply.

The legal reasoning of the Court first summarized the constitutional model of social security in health, the legislative competences and the development of the case law. Second, it summarized the legislative history of ARS also supported by constitutional case law, particularly on rulings referring to the definition of health resources as payroll taxes. Third, it summarized the constitutional regime of the intervention of the state and private sector participation in the social security health service, and related case law. Fourth, the exercise of economic activities and the obligations to compensate when an economic freedom is limited were analyzed. The court based itself on legislative antecedents, to find the legislative purpose (the adjustment of the model to strengthen territorial hospitals and maximize resources); it concluded, based on the P.C. (48-9, 365), that the rule did not limit economic freedom because it regulated a public service, and therefore the compensation did not apply because the resources transferred to territorial entities are payroll taxes and the competences are part of the social security service. Fifth, the principle of progressiveness in social security and the management of the corresponding resources were analyzed and it was accepted that empirical analysis in constitutional cases may be determinant. The court quoted case law when analyzing the relevance of the historical context and the social reality in many cases. The Court argued that the principle of progressiveness is a parameter for the constitutional analysis imposed by the law and by case law. It quoted two rulings of this "jurisprudential line": C671/02 which recognized a minimum core content of provisions vis-à-vis each provisional right, and C1165/00 which struck down Law 334/96 (34) because the resources of the subsidized health regime decreased. The latter ruling is one of the rulings quoted by the IMF as disturbing the financial system of the health sector. The Court concluded that the challenge did not present an empirical analysis that proved the violation of the principle of progressiveness,

³⁴⁴ The principle of reserve of the law establishes that it is an exclusive competence of the Congress to issue the laws of economic assistance provided for (the general management of the economy), and to specify the purposes, scope and limits of economic freedom (P.C. 150(21)).

whereas the legislative antecedents of Law 715/01 (prepared by DNP and the Ministries of Health, Education and Finances) proved the need to adjust the distribution of competences among territorial entities and ARS, to deepen the decentralization and favor to the efficient use of public resources. Then it analyzed whether the determination of the percentage of resources transferred to territorial entities could be delegated by the CNSSSS, as the law did, or whether it was an exclusive legislative competence. Based on the P.C. and case law, it remarked that the law did not define the criteria to quantify the resources to be transferred to territorial entities, but that “some constitutional criteria” allowed determining them. These constitutional principles were: i) the impossibility to decentralize responsibilities without the allocation of resources (365 P.C.), ii) the principles of universality, efficiency and solidarity and the progressive provision of the service, and iii) the criteria of proportionality and equity. The Court conditioned the constitutionality of the determination of the percentage of UPC-S (payment unit per capita for the subsidized regime) by the CNSSSS to be transferred to territorial entities to reflect the transferred competences. It established that the percentage could never be less than 50% of the resources allocated for prevention and promotion unless the law would regulate the percentage. This decision was not supported by any rule or argument and such an extensive sentence concluded without a real explanation of the decision.

Sentence **C566/03** analyzed L715/01 (91) which obliged SGP resources to be managed in separate accounts in the budget of territorial entities and by sectors. Provided their constitutional earmarking, they cannot be embargoed or compromised in other financial ways. The challenge argued that the P.C. (13 and 229) was violated because private persons are discriminated when they cannot claim their substantial rights once the administration is in moratorium. The General Comptroller and the Ministry of Interior and Justice asked the conditional constitutionality based on past constitutional case law. The General Auditor and the Ministry of Finance asked the constitutionality, also based on constitutional case-law. The legal reasoning of the Court summarized the constitutional and legal (Law 715/01) regime of the SGP. Then, it summarized the evolution of the case law (“jurisprudential line”) on the principle of unattachability of the budget and its exceptions. It concluded with C793/02 (Law 715 (18)) which accepted as exception to the unattachability, those obligations originating in the activities described in Law 715/01. However it was not a case of *res judicata*. After summarizing again the P.C. (63) and the case law on the unattachability, it conditioned the constitutionality of the rule as C793/02 did. It is a very “traditional” sentence, using the textualism method and respecting past case law (which was not necessarily a precedent).

Sentence **C568/04** also referred to the budgetary aspects of Law 715/01 (64), particularly the transfer of SGP resources from the central government to territorial entities. The challenge argued the violation of the P.C. (356-7) because the budgetary appropriation was “arbitrary”. The rule violated the principles of the Legal Social State, the community service, the promotion of prosperity, the effectiveness of constitutional principles, rights and duties, and the provision of services (P.C. 1, 2, 44, 48, 49 and 50). The General Comptroller defended the legislative purpose of reaching fiscal equilibrium to strengthen the fiscal expenditure in real terms through the SGP. The Ministry of Finance defended the discretionary legislative competence because the P.C. did not determine the form of the transfer. The P.C. ordered that all appropriations included in the Annual Budget Law should be previously caused by the P.C. or by the law, and that their execution is possible once they are included in the Annual Budget Law (346 P.C.), as occurred with Law 715/01. Striking down this norm would create a larger fiscal deficit, whose control is a goal of the government to avoid a macroeconomic crisis (unemployment growth, poverty and inequalities), and would lead to a risk of defaults, as occurred in Argentina. DNP shared this position by adding that the distribution was realized on the basis of CONPES documents. The Public Ministry defended the rule because the challenge should be presented against the Annual Budget Law and not against Law 715/01.

The legal reasoning of the Court was centered on whether the authorization to appropriate an amount other than the one established in the P.C. would perturb the service provision and whether it violated the P.C. First, it quoted the constitutional regulation of the SGP which fixed a precise amount of the SGP to be appropriated. However, the transfer procedure was not determined and therefore the Court accepted the discretionary competence of the legislator to regulate it according to the situation of the public finances, cash flow, and the P.C. Law 715/01 was upheld because the amount of the transfers would depend on the estimation presented in the Annual Budget Law, which does not mean that it would be different from the P.C. Second, the Court accepted CONPES documents presented by the DNP to explain that the resources ordered by the P.C. were included in the budgets of 2002-3. The constitutionality of the Annual Budget Law was not analyzed because it was not challenged. As a result, the form and terms of transfers were upheld; The Court quoted case law on the law reformed by law 715/01 which found the terms of the transfer reasonable (thus approving the discretionary legislative decision) because the functioning of the services may not depend on the moment of the transfer. However, the estimation of the SGP as an amount that should be transferred in each fiscal period could affect the amount of transferred resources because it limited the budgetary estimation to the amount of the transfers of the fiscal period and not to the

constitutional parameters (356-7 P.C.). Budgetary authorities could estimate this amount in a discretionary way, which is unconstitutional. The sentence minimized the arguments of the challenge and the interveners, which contrasted with the extensive and reiterative quotation of constitutional and legal norms. The decision was based on a textual interpretation of the article (which in itself was considered as not clear), and no additional techniques of interpretation were used.

In this group, the rulings did not seem to have a big fiscal impact. Three of them dealt with the protection of the participation of the private sector in the provision of the service and the constitutional duty to intervene the market by law, forbidding discretionary action of the executive in those issues. When C 791/02 referred to the legislative competence to limit the participation of the private sector, it applied directly the P.C. (using general constitutional principles) to fill the legislative gap and, therefore, to declare the constitutionality of the law, whereas in other cases the Court struck down the rule because it violated the principle of reserve of the law. In C791/02 the Court regulated the concrete case, replacing the role of the legislator and the executive. In contrast, C 097/02 which analyzed the delegation of extraordinary legislative competences to the executive to “organize a system of inspection, control and surveillance” that would manage the SGP, struck down those competences because the delegation lacked a “strictly restrictive criterion” (reserve of the law) to guide the executive. This reform was proposed in the IMF advice (annex 4.7 on IMF structural reforms). C 568/04 may have had a fiscal impact because it modified the transfer of the SGP according to the appropriation of the annual budget law. However, despite the claim of the Ministry of Finance that the rule was needed to protect the macroeconomic stability, apparently this ruling did not cause a big impact. The structural adjustment was presented by the government as an argument of convenience because striking down the rule would “create a bigger fiscal deficit whose control is a goal to avoid a macroeconomic crisis and risks of defaults”.

In this group of rulings, the government privileged arguments based on the purpose of the law, on the textual reading of the P.C. and Law 715/01, but mainly on the case law doctrine related to the different institutions (not necessarily being a precedent). The purpose of the rules was usually identified with the antecedents of the rule (exposition of motivations), and in some cases it was found in the P.C. The relevant empirical analysis was the analysis of governmental bodies (mainly CONPES) and the analysis presented in the legislative antecedents which also mainly corresponded to the governmental analysis. These documents were recognized as sufficient proof of the need for adjustment and as a sufficient purpose of the

rule, and in one case (C568/04) as a sufficient proof of the compliance with the P.C. In many cases, the Court accepted the discretionary legislative competences and this was a sufficient justification of the reasonability and proportionality of the rule which was a synonym of constitutionality. But when the Court found that the purpose of the rule was not expressed or when the competence was not considered as discretionary, it struck down the rule (C097/03). However, in another ruling, despite the vagueness of the rule, the Court defined the criteria on the basis of general constitutional principles and conditioned the constitutionality to the respect of those criteria, taking the place of the legislator (C791/02). The reasonability and proportionality were thus used as synonyms of constitutionality; and this constitutionality depended mainly on whether the Court found a purpose of the law and whether it accepted the discretionary competences of the legislative and agreed on the way they developed them. It did not correspond to the application of a specific international method of balancing, nor to the method of subsumption. This group of rulings was mainly decided unanimously. International legal theory was mentioned in two rulings, but it did not determine the decision; they were only mentioned as illustrative example for one of the issues analyzed, and mainly authors from Spain were quoted. Constitutional and legislative history was used but mainly by one justice and not in the majority of rulings.

The third group was composed, first, by **C316/03** that struck down Law 643/01 (6). It authorized that financial monopolies be operated by mixed corporations. The Ministry of Finance argued that the law would not affect health resources. The legal reasoning of the Court was based on constitutional antecedents, the text of the P.C. and Laws 643/01 and 489/98 (on the structure of the public administration). It concluded that those corporations cannot operate financial monopolies because the private sector would own them which is forbidden by the P.C. and health resources would be affected by the distribution of utilities. Second, **C005/03** struck down Law 715/01 (9§2) because it reformed Law 643/01 violating the legislative procedure established by the P.C. (336).

The fourth group of rulings analyzed the ISS restructuring. They were classified in the jurimetric analysis (chapter 4) in the category of the Modernization of the State because Decree 1750/03 developed legislative competences by delegation of Law 790/02. Unconstitutional and conditioned rulings focused basically on the protection of labor rights of ISS employees. Other topics of the restructuring were practically neglected by the challenges and by the Court. D1750/03 divided the ISS Vice-presidency of health services, the clinics and ambulatory centers and created seven ESE's linked to the Ministry of Social Protection.

C314/04 analyzed D 1750/03 (16 and 18). The first article modified the labor relation of the ISS employees when the ESE was divided. The workers of these new institutions became “public employees” (in general, with some exceptions) instead of “official workers” as they were in the ISS³⁴⁵. The second article ratified that the regime of salaries and labor benefits of the ESE employees would be the one of public employees, respecting acquired rights. Acquired rights in terms of labor benefits are consolidated legal situations, i.e. those caused and those that have entered in the workers’ patrimony. The challenge argued the violation of the right to equality (13 P.C.) because ESE employees should have the same labor regime as employees of the ECIE, otherwise the right to negotiate collective bargains would be violated as well as other constitutional rules (1, 25, 53, 55-6). Those workers benefitted from a collective bargain and a permanent labor relation. The rule changed their situation to a provisional labor relation, lowering their income because labor benefits from the collective bargain would take an end (C 013/93). ILO Conventions 97 and 98 were also violated (Laws 26-7 /1976). The Colombian Academy of Jurisprudence joined this position.

The Ministry of Finance, based on the legislative history, claimed that the labor regime of employees of public decentralized organisms adopted the organic classification criterion: in public establishments they are mainly public employees and in the ECIE they are mainly official workers. That was why C-579/96 struck down Law 100/93 (235). Second, D 1750/03 adopted the organic criterion of Law 100/93 (195) and Law 10/90 defined the ESE. The legislative purpose of the ESE was the provision of health services which justified the special labor regime. Arguments claiming to disregard the right to negotiate collective bargains do not apply to the rule but to its consequences. Based on constitutional case law, the Ministry defended the limitation of this right because the doctrine of the irreversibility of labor rights is not absolute and acquired rights were protected. The Ministry of Social Protection joined this position, adding that the labor regime is part of the restructuring and C262/95 should be reiterated. The ISS also joined, quoting case law (C408/94, C702/99) and claiming that the ESE are a special category of institutions whose characteristics are not sufficient to be considered a ECIE and their purpose (the provision of health service) is not commercial or industrial. The equivalence with ECIE is inconvenient because it would create a problem of equality vis-à-vis other ESE. The legal regulation of the labor regime of the state is only limited by

³⁴⁵ The four rulings referred widely to this distinction between State employees. “Public employees” are appointed by nomination and their labor regime is determined by law or by executive guidelines. In principle, they cannot negotiate collective bargains. “Official workers” are linked by a labor contract and they are submitted to the ordinary labor law with all the benefits that this condition implies. They can negotiate collective bargains.

fundamental rights and the purpose of the rule was to modernize the structure of the state to warrant the financial sustainability. C013/93, did not apply but instead C168/95, which rejected the irreversibility theory of labor rights. The ISS concluded that ESE employees are not provisional because the condition of the administrative career was extended to them. The Ministry of the Interior joined this position, quoting case law (C003/98) on the constitutional bases of the labor regime. The Public Ministry defended the delegation of legislative competences to rationalize the organization and functioning of the Public Administration to protect financial sustainability, based on the legislative purpose (150 (7,19),189 (15-6) PC). Constitutional protection of labor rights (25, 53 y 125) does not impede to modify the labor regime because no right is absolute and the special objective of the ESE justified the special labor regime.

The legal reasoning of the Court focused first on whether the difference in the labor regime between the ESE and ECIE violated the PC (13), and particularly, whether the change in the legal regime of the former employees of the ISS violated their acquired rights, especially the right to collective negotiation and other conventional rights. Based on the constitutional case law (C306/04), it concluded that the legislative delegation included the regulation of the labor regime. To analyze the potential violation of the right to equality, it quoted international doctrine (Alexy) and case law of the European Court of Human Rights (quoted by T422/92). The Court concluded that constitutional case law specified the requirements for differential measures (C963-03), but they were not analyzed in this particular case. The challenge quoted C579/96, which accepted the doctrine of the Council of State (cf. *infra.*), and may be seen as a precedent (or part of the “jurisprudential line”, in terms of the court). However in this ruling, the Court, considered the argument as not being a “relevant criterion to justify the similarity between ESE and ECIE”, and the support from this case law was considered “insufficient and legally irrelevant”. The Court accepted the interveners’ thesis which justified the distinction in the organic criterion, i.e. based on the organization of the state (L489/98)³⁴⁶: It concluded that the P.C. did not oblige the legislator to homogenize the labor regime of the public administration and new categories can be established to satisfy “with flexibility the needs of the service”. C 579/96 was quoted³⁴⁷ but the Court omitted the main reasoning of this ruling³⁴⁸. Despite this

³⁴⁶ This law is posterior to the ruling but the structure of decentralized entities was not substantially modified.

³⁴⁷ Other case law referring to more general issues was also quoted: 880/03 (Law 790/02 on employment classification) and C352/98 (labor regime of enterprises of public utilities).

³⁴⁸ The main reasoning was that if ISS workers would be social security employees (linked by appointment and not by contract, which is the general rule of the ECIE) it would violate the principle of equality (13 PC), because those workers would not have the same rights and protection as ECIE workers. Once the ISS becomes EICE, its workers would have to be official workers as a rule and would be public employees as an exception. The category of social security employees is unconstitutional, unless the

similarity, the argument of the challenge was considered an incomplete comprehension of the legal nature of ESE and ECIE. Based on C665/00³⁴⁹, the Court denied its similarity mainly on the basis of their institutional objectives and therefore, they cannot have the same legal regime. It concluded that the labor regime of ESE was regulated since Law 10/90, and reiterated by Decree 1750/03 (16). Its social object impedes to give it the same labor regime as ECIE; whereas exactly the contrary was affirmed in C579/96.

Second, the Court analyzed the subsequent violation of acquired rights (58 P.C.), following similar schemes as in previous rulings, i.e. by presenting widely the general issues. It analyzed first the acquired rights based on the text of the P.C. and case law from the Court and the Supreme Court of Justice. Then it referred to the right to present collective bargaining agreements, starting with legislative history and related case law. It concluded that the impossibility to present such agreements did not violate the acquired rights, because the law defined as “rational and proportional” any labor regime of workers (C090/02). It concluded that when a labor regime is regulated by law or executive guidelines (appointment), practical and political difficulties to negotiate collective bargains are sufficiently inconvenient to prohibit them. Quoting case law, it settled that the labor regime (and its consequences) is not an acquired right because the law has a general competence of regulation of the state structure, according to the valuations of public needs, which does not violate the P.C. (55). It concluded that: I) public employees do not lose the rights to association (39 P.C.), to create trade unions and to have jurisdiction (*fuero (protection, immunity)*). They can negotiate their labor conditions (ILO 151: Law 411/97), and in some cases they can negotiate collective bargains (C201/02). II) The rules aimed to protect the public interest. III) The norm did not regulate how labor rights are affected; from its wording the Court cannot determine whether the law modified acquired rights because it does not establish which benefits were modified. Finally, the Court, quoting several of its own rulings and some of the Supreme Court, concluded that when the restructuring of the state affects the labor regime, acquired rights should be protected (Law 30/96). The expectations may be discretionally modified, but it argued that the doctrine on the respect of the good faith adopted by the Court, was translated in the trust generated towards citizens vis-à-vis a specific legal regime. The reform should foresee the effects on concrete legal situations which are not consolidated (acquired rights) but that are valid expectations vis-à-vis the permanence of the regulation (C- 478/98, C-355). The constitutionality was conditioned to the protection of salaries and benefits (53 P.C.), including those rights obtained through collective bargains (CST (467), and

law detailed which employees are freely appointed and dismissed. C484/95 established that the law may authorize this determination to the statutes.

³⁴⁹ This established the difference between the ISS and public establishments, as C579/96 assimilated them with ECIE.

SU-1185/01).³⁵⁰ Two dissenting opinions highlighted that extraordinary competences to determine the labor regime were not conferred (150-7).

Although **C579/96** was not included in the jurimetric analysis, it was analyzed here because the IMF qualified it as one of the rulings that were responsible for the fiscal problems of the health sector, and because it defended the thesis modified by C314/04. This ruling analyzed Law 100/93 (235 §) which established that despite that the ISS was converted in to ECIE, its workers would continue to be social security employees. The challenge alleged also the violation of the right to equality (13 PC). Based on legislative history, it argued that the ISS was transformed in ECIE in 1993 and that therefore the workers should not be considered as social security employees, without an objective and reasonable justification of the employed means given the target finality. Otherwise, they would be in a situation of inequality vis-à-vis official workers of ECIE. The intervention of the ISS argued that the legal nature of ISS was as the one of the ECIE, but that its characteristics were different from other ECIE which justified the special labor regime. The legal nature was determined by a Decree of 1977, not by Law 100/93. In addition, the P.C. (123, 125, 150 (12, 23)) allows the law to define the types of public employment. The Public Ministry based its argument on the legislative history since 1948, and concluded that Decree 1651/77 established a *sui generis* category, intermediate between the categories of public employees and official workers³⁵¹, and that therefore the classification established in Law 100/93 (235,275) was justified by the characteristics of the ISS and the activities executed as ECIE. The reasonability of the discrimination is derived from the realization of the right to social security.

The legal reasoning of the Court presented first the labor regime of ECIE workers, based on legislative history since 1968. It concluded that the legislative competence is not discretionary because it depends on the activities realized by the employees. Despite the lucrative activities of ECIE, they belong to the State and some workers accomplish public functions (DL 3130/68 which was reformed by Law 498/98). The labor regime should be defined by law and exceptionally by the statutes. D3135/68 (5) established that ECIE

³⁵⁰ This conclusion was very confusing because apparently this ruling “corrects” C579/96, accepting the limitation of the labor benefits of the former ISS employees. However this ruling did not clarify i) whether the alleged right acquired by collective bargaining referred to the one that the government considered as a simple political agreement (cf. infra) ii) which expectations should be respected. From the economic point of view, it is not clear whether labor benefits obtained by C579/96 and criticized by the IMF would be recognized until the enactment of D1750/03, as the government aimed, or whether they were a “valid expectation that should be protected” and therefore should be further recognized.

³⁵¹ They are appointed but may negotiate collective bargains to determine salaries; the Supreme Court of Justice upheld the constitutionality of the regime (17.02.1976).

employees were official workers, supported by C484/95³⁵². The purpose of the law was to oblige the conversion of the entity into an EPS and to compete for the provision of the public service of social security, following the principles of efficiency, universality and solidarity. The structure of an ECIE was adopted to provide health services, and the labor regime should in general be the one of official workers, as the case law determined when it analyzed the labor regime of the ESP (Public Utilities Corporations) which are also ECIE (C253/96). The Court concluded that ISS workers should in general be official workers due to the special activity that they develop.

Second, the Court analyzed the legal nature and regime of ISS workers based on the legislative history. The possibility that the law may create ECIE with a special, more restrictive, labor regime was accepted, but considering the activity of providing the public service of social security in identical competitive circumstances as the private sector. It was lawful that ISS employees were official workers, as a general rule, as in the case of the ESP, which adopted the same legal form. The Court concluded that the P.C. (13) accepted different labor regimes when the workers are in different factual situations or when there are enough reasons, i.e. according to the constitutional principles, values and rights. The law should then regulate the labor regimes without discrimination (123, 125, 150(23) P.C.). The ISS was an ECIE and its workers were by rule official workers because they realized management functions and provided public services in the same circumstances as private enterprises and ESP. According to the Court, Law 100/93 (235) violated the principles of equality and labor protection (P.C. 55), but the last one would have legal and constitutional limits due to the character of health as a public service (366 CP). In fact, going on strike or collectively suspending of the service were prohibited. The Court struck down Decree 1651/77 and the challenged rule because they created a situation of inequality without an objective and reasonable justification, and without a balance between the means employed and the goals (C253/96).

C-349/04 analyzed D 1750/03 (18, transitory paragraph) which established the automatic transfer of ISS workers to the ESE personnel. According to the Decree, if they would not accomplish the requisites to be in a new post in which they would receive at least the same basic monthly salary as the one they received in the ISS, they should occupy a post for which they would be accredited. The challenge argued that the delegated legislative competences did not authorize to engage “automatically and “without interrupting the

³⁵² According to C484/95, once the ISS became ECIE, the functions of public service provision should be realized by official workers and the law could not ignore the constitutional protection of their labor rights including the right to negotiate collective bargains with some exceptions.

continuity” official workers as public employees, because they had the right to terminate the contract and to pay the severance pay of the collective bargain. Those contracts did not foresee the division of the ISS as a just cause of the termination of contracts and therefore the P.C. (53, 55) was violated. Retroactive effects were demanded on the basis of constitutional case law. As proofs were presented i) an analysis of the ISS restructuring, the crisis of the social security system and the reform of the health sector, ii) a copy of the collective bargain (2001-2004), and iii) the management report (2001-2002). The interventions of the citizens joined this position and presented as a precedent C880/03 which stated that the restructuring of the state should not affect employment stability and should make sure that salaries and labor benefits are not deteriorated. The ISS presented the opposite argument; the norm was presented as a way to realize the principle of stability of employment (53 P.C.) and to protect labor rights, and it quoted C562/96. This constitutional principle was one of the purposes together with the continuity in the service which was crucial for the state. Labor conditions were modified because the legal nature of the ISS changed. The severance payment was not lawful because the P.C. (55) was not violated, and this issue must be discussed in the ordinary jurisdiction. Doc CONPES 3219/03, financial and technical studies prior to the reorganization of the ISS and of the viability of the ESE, and the quantification of the savings generated by the ISS convention of 2001 were presented as proofs. The Colombian Academy of Jurisprudence and the Public Ministry joined this position. The Ministry of Internal Affairs added that taking the context into account, the agreement with the trade union was not a collective bargain; it only had a political scope and did not generate acquired rights. The division had an objective and reasonable justification: the financial sustainability of the ISS. The constitutional purpose of the rule was the protection of labor rights and the continuity of the service. The Ministries of Social Protection and Finance shared this argument but the latter added that the reform of the labor regime did not violate acquired rights, although it improved the labor cost of the health service of the ISS. The reform would be innocuous if the labor regime would be kept as it was. The wage level was protected but the labor benefits diminished in the general interest.

The legal reasoning of the Court first integrated article 19 in the analysis. This article defines the conditions of the new post.³⁵³ The analysis focused on the violation of the right to belong to trade unions and to negotiate collective bargains, when the workers lose bargain benefits. The Court quoted, first, case law on the stability of employment (53 P.C.), not understood as an absolute right of labor stability for the employee but the assurance of a just cause to finish the labor relation, e.g., the right to indemnity when the

³⁵³ This may be seen as judicial activism because it was supported in case law and was highly debated in three dissenting opinions that attacked the declaration of article 19 as constitutional without being challenged.

expectation to stay in the post was unjustly ignored, as may occur in restructuring processes (C1341/00). Indemnity conditions were analyzed by case law. The Court concluded that the reform of the labor regime in a restructuring process does not affect labor stability (C203/97).³⁵⁴ The wording of the norm showed the legislative will (to extend the rules of the administrative career to provisional positions of ISS employees (53, 125, P.C.)), and the guarantees of article 19 favor the employment.³⁵⁵ Second, C314/04 was quoted as precedent on the violation of the right to trade union association and collective bargain negotiations, because labor benefits that were recognized by the convention in force were lost. The ordinary definition of the word “automatic” was the meaning adopted by the law and the legislative purpose was to prorogate the preexisting labor relation despite the new regime. However, labor rights were violated with the definition of acquired rights and therefore the conditioned ruling of C314/04 was adopted. The conclusions of the Court were contrary to the challenge: the norm warrants the labor rights, allowing the workers to continue with conventional benefits in force and under the transitional pension regimes during the same period. Without this continuity, the labor benefits would not be warranted because the duties of the convention would cease.³⁵⁶ Two concurring opinions claimed that C314/04 should express that former ISS workers would continue with all labor rights derived from the labor contracts and collective bargains in force at the enactment of D1750/03, otherwise it would violate the P.C. (25, 55).³⁵⁷

C-559/04 analyzed D1750/03 (3, 4 and 6); i) Article (3) defined the object of ESE as the provision of health services, as an essential public service of the State or as part of the public service of social security (Law 100/93 (94)). ii) Article (4) determined the general competences of ESE, particularly (#6) to contract with companies created by the former ISS employees who would be fined by the restructuring; the aim being the correct provision of health services under the parameters of the Board of Directors, and (#7) to warrant the social and financial return of ESE. iii) Article (6) expressed that the creation of ESE depends on the needs of the service and must seek their social and financial profitability. The challenge claimed, first, that “essential” public services should be defined by statutes, except when the competence is expressly delegated. Law 790/02 did not transfer this competence and violated the P.C. (56) (C725/00). Second, article 4(#6) violated the PC (13) because it excluded other companies that are in the same or better

³⁵⁴ Employees with career positions may choose between retirement or a new appointment (Law 443/98 (39) C370/99).

³⁵⁵ Case law on the access to a career position was quoted to justify the impossibility to appoint former ISS employees in career positions without presenting a public competitive examination (Law 443/98 (37)).

³⁵⁶ Labor benefits conceded since C 579/96 were conserved by those rulings but with different arguments.

³⁵⁷ The dissenting opinion of Justice Araujo is relevant for the topic of this research but not for the ruling: the ruling violated the fundamental principle of legal theory: the law should be logic, coherent; it cannot be ambiguous, confuse or vague. Legal fraud was committed because the spirit of the law was to preserve the ISS and not to violate labor rights.

conditions to provide the services. If former ISS workers delivered necessary services, the law could not authorize their retirement and allow to hire them without a labor contract because the special protection to work would be violated. Articles 4(7) and 6 were unconstitutional because the main goal of the ISS should not be its financial profitability and thus it exceeds the legislative delegation. The Universidad Santo Tomás argued that the financial crisis and the coverage deficit of the health sector was known and justified its restructuring (public convenience). The purpose of the delegation of legislative competences was to rationalize the organization of the ISS to warrant the financial sustainability and therefore Law 489/98 and the P.C. (189 (14-6)) were respected. The Ministry of Finance argued the respect for the “integral agreement” with the trade union (where all agreed on the unity of enterprise) and the principles of concertation and good faith. The agreement is a list of purposes to save the ISS, whose organization impedes its social function. It had a political scope in areas in which the state is sovereign, and it is not a source of rights. The qualification of “essential”, made by the government, just repeated Law 100/93. Article 4 (#6), did not violate the P.C. (13) because its purpose was to correctly provide health services, using the experience of former workers. The Ministries of Protection and of Interior Affairs agreed with this argumentation, but the latter added that the legislative delegation sought to warrant the financial profitability of the State, which justifies this objective of the ESE. The ISS added that its structural adjustment was unavoidable due to its critical situation; the convenience and necessity to delegate legislative competences were presented in document CONPES 3219/03. The Administrative Department of the Public Function joined. The latter quoted SU819/99 and added that the expression “financial” did not refer to a lucrative purpose but to the financial sustainability of the Nation, in accordance with Law 790/02 (1, 16). The Public Ministry defended the restructuring of the State, guided by the general interest; the protection of labor rights does not prohibit to modify the labor regime which is part of the nature of the entity and not an acquired right (C880/03).

On the first issue the Court argued that the P.C. (56) orders essential public services to be defined by law, and the government could not use those competences. Although Law 100/93 defined health service provision as essential, when D1750/03 extended this qualification to ESE, it did not reiterate Law 100/93 because the ESE were created afterwards.³⁵⁸ On the second issue, the Court argued that the legal purpose

³⁵⁸ However, in C314/04 the Court affirmed that ESE was created since 1990. Three dissenting opinions and the Public Ministry claimed that the government did not go beyond the legislative competences when it defined the service provided by ESE as essential, because the Congress recognized this quality before (Law 100/93). One of them concluded that the law should not be struck down because other rules defined health services as essential.

was the correct service provision and conditioned the constitutionality to the compliance with the contractual principles of transparency and objective selection. On the third issue, after presenting a summary of the contents of D1750/03, the Court concluded that the rationalization of the organization of the public administration to protect financial sustainability was among the objectives of Law 790/02 (C121/04). The establishment of the financial and social profitability of ESE did not exceed the delegation but it developed it, and complied with the constitutional principle of efficiency (48-9 P.C.) in health service provision, besides the universality and solidarity principles. Developing an integral control of constitutionality³⁵⁹ of the provision of health services by ESE, the Court concluded that according to case law doctrine, the “financial profitability” implies that the coverage of health services should avoid any discrimination and should prefer the criterion of sustainability in the long term. It is not a management parameter to obtain utilities, nor an argument to be used against the users to justify the sacrifice of constitutional principles. The solidarity principle implies that the capacity of payment should not always be a condition to have access to the service because in some cases the right to health should be protected even in the absence of payment capacity, as the Court did through the APFR by “balancing the issue”. It concluded that APFR case law would establish the scope of the challenged rule vis-à-vis constitutional principles. The constitutionality was conditioned, prohibiting that financial arguments justify the rejection of an opportune and efficient service without using the APFR³⁶⁰

In this group of rulings, the over-use of quotations and literal transcriptions as case law technique is remarkable. The size of the interventions, the dissenting opinions as well as the Court reasoning, varied considerably, depending on the reporting justice. The relevance of legislative antecedents (exposition of motivations) is highly important and is synonymous to legislative intention. In some cases, the arguments that support the decision were remarkably short given the size of the sentence and the legal reasoning was not clear because it was based on of a series of general topics before analyzing the concrete case.³⁶¹ The form of quotations and the methodology depended on the justice and this variation muddles case law analysis. Long sentences allow quotations from the same ruling even in contradictory arguments. The government mainly used as an argument the legislative purpose of the institution (ESE), which was the financial sustainability of the system and which was based on the purposes of the legislative delegations (the financial profitability of the system), considered as an “objective and reasonable justification”. This

³⁵⁹Law 270/96 and the P.C. (241) order the confrontation of the challenged rules with the whole P.C.

³⁶⁰ A dissenting opinion argued that the health service is a universal public service, not subordinated to financial reasons.

³⁶¹ C579/96 (mentioned by the IMF) is shorter than the group average, but even this ruling excessively repeats the same ideas.

option was justified in constitutional case law. The purpose of the law was assimilated with the purpose of the government. This way, they affirmed that the constitutional purpose of protecting labor rights and the continuity in the service were respected. However, the government also presented arguments of convenience: the purpose of the rule was to reduce labor costs of the ISS health system, by reducing labor benefits in the general interest. CONPES Documents were presented as proof of the situation and of the convenience and necessity of the reform. The collective agreement was rejected because it was qualified as political and not as a collective bargain that generated rights and duties.

The Court used as main type of arguments the evolution of case law of the mentioned institutions (basically collective bargains and acquired rights). Legislative history was also used. The first ruling concluded that the legislator defined in a “rational and proportional” way labor rights, and it presented an argument of convenience: “the practical and political difficulties to negotiate collective bargains” justified its limitations. Textualism was also highly used in this group of rulings. C314/04 concluded that the drafting of the rule did not allow determining whether the law modified acquired rights because the modification of labor benefits was not specified. C349/04 concluded that the drafting of the rule showed the legislative will and the protection of employment; the purpose of the law was to prorogate the pre-existing relation (contrary to the arguments of the Ministry) and the constitutionality was conditioned to the continuity of the conventional labor benefits in force when the ISS was divided. This ruling did not protect acquired rights but expectations. It justified the decision by referring to case law doctrine on the “good faith”, which was not developed in the ruling.

The Court used “precedents” in a remarkable way: C314/04 rejected C579/96 (quoted by the IMF and CONPES) because it was not a sufficient criterion to justify the similarity of the created ESE with ECIE, as the challenge claimed. The argument of this ruling (the social goal of these companies, i.e. the provision of health services, justified its assimilation with ECIE) was used to conclude the contrary: this legal goal impedes to assimilate them with ECIE. C349/04 accepted C314/04 as precedent to rule that labor benefits recognized in collective bargains should be respected but it kept silence with respect to the argument of the government that these agreements had a political scope. C559/04 based its decision on previous rulings that defined the financial sustainability of the system as the purpose of the reform, in accordance with the constitutional principles of the health service provision, but conditioned its conditionality and imposed that the APFR case law would indicate the scope of this rule. Dissenting and concurring opinions aimed to

reinforce the respect for labor rights and benefits and the non-recognition of the financial sustainability of the system as a purpose of the health service. However, this position was a minority position and did not go against the arguments of the Court in concrete terms.

The potential impact on the IMF arrangements was not clear because apparently the Court changed the doctrine presented in C579/96, which was attacked by the IMF, but the conditioned ruling may imply that despite the different legal conclusion, the economic consequences of the first sentence were maintained, because, contrary to the arguments of the Ministry of Finance, labor benefits obtained in the collective bargains were maintained. However, this was not analyzed by the IMF.

CONPES document 3219/03 (presented as proof in the referred judicial review processes) defined the modernization plan for the ISS health sector and claimed that its structural problem was aggravated by two rulings of the Court: C 579/096, here analyzed, was accused of increasing the number of workers with the right to collective bargain benefits from 2.000 to 24.000, increasing thus labor and pension benefits. SU480/97, which ordered the ISS to contribute to the solidarity fund of FOSYGA since 1997, deepened the crisis because before this ruling only private EPS complied with this duty.³⁶² Until 1996, this situation was justified by the management and information problems of public EPS, and therefore they were given 4 years to organize the information system to initiate the transfers. The problem had been affecting the service provision but also health workers and the IPS. These situations, together with other financial and administrative problems of the ISS, forced CONPES to conclude that the ISS would be unviable and the reform of D1750/03 was justified.

CONPES document 3456/07 analyzed the situation after the reform. It concluded that the structural deficit continued, mainly because of pensions and the operational deficit. On the basis of the evaluation of D1750/03 it concluded that the reform diminished the operational losses, although the figures showed that in 2000 the liabilities surmounted the assets by 45% and at the end of 2005 even by 84.4%. The new EPS did not have enough operational revenues to cover the combined cost of the service provision (which

³⁶² Law 100/93 (204) delegated to the EPS the collection of the contributions to the sector (which represent 12% of the salary base of the contribution). One point of these 12% had to be transferred to the solidarity account of FOSYGA. The central government had the duty to transfer an amount equal to 1% of this contributive regime to this account. Law 344/96 diminished this percentage to 0.5% of the contribution of the health sector and 0.25 from 1998. C1165/00, mentioned by the IMF, declared this reform as unconstitutional. This article was modified by Law 112/07, increasing the contribution to 12.5% of the salary base of which 1.5% had to be transferred to the solidarity account of FOSYGA.

represented 90.6% of these revenues) and the operational cost (which represented 56% of the revenues) producing an imbalance of 47% of the revenues in 2005 (CONPES 3456/07:5). Curiously, CONPES affirmed that the ISS is an ECIE (despite the reform and the court rulings) that competes with private enterprises and that is why Law 489/98 prohibited the nation to grant credits or transfers other than the ones authorized by law (CONPES 3456/07:10). The labor inflexibility (due to the collective bargaining and the management of the entity) and the epidemiological profile of the affiliates (45% of the affiliates were older than 45 years and an important share were patients with high cost illnesses) were the main sources of the level of ISS expenditures. It claimed that 98% of employees were official workers and that most of them did not have jobs directly related to health provision but due to the clause of labor stability of the collective bargain they cannot be reorganized.³⁶³ The CONPES recommended designing alternative measures in case the National Superintendence of Health revoked the license of the ISS- health sector.

Therefore, the purposes of the reform were not met. Although the Court rulings apparently supported the norm and the Court changed its case law of 1996, the labor cost pressure did not change or was even aggravated. It is not clear whether the conditioned constitutionality of the rulings maintained the effects of sentence 579/96; apparently it did. Despite the extended debate on the legal nature of the labor contracts of the ISS after its division, CONPES assumed that they conserved the category that they had before D.1750/03 and the discussion presented on the constitutional case law did not appear as relevant.

Table 5.8 summarized the arguments of the Constitutional Court in each ruling, (including dissenting and concurring opinions) as well as the arguments of the government, to identify whether structural adjustment measures were taken into account.

Table 5.8 Arguments used by the Government and by the Constitutional Case Law Related with IMF Structural Reforms in the Health Sector.

Ruling - pages ³⁶⁴	Arguments of the Government ³⁶⁵	Arguments of the Court used to decide the challenge.	Dissenting and concurring votes
L 617/00			
C540/01 229(166-	Ministry of Finance: - Textualism: the P.C. gave	- The purpose of the rule and of the institution - Constitutional case law (judicial review and APFR)	1. D.O. The norm is a disproportional and

³⁶³ It quoted that, according to this collective bargain, the labour benefits of these employees represented 48% of the salaries, which contrasted with the 29% for the rest of public employees. These calculations excluded pension provisions.

³⁶⁴ The total number of pages of the sentence, including dissenting and concurring opinions; when the ruling is only a part of the sentence, the total number of pages of this particular ruling was included in parenthesis, excluding D.V. or C.V.

³⁶⁵ The aim of this category was to identify whether the government made the commitments of the IMF arrangements explicit in the constitutional judicial review of the reforms. The arguments were mentioned when they actively supported structural reforms.

173)	a discretionary competence to the legislator to limit current expenditures of territorial entities.	which were not precedent. -The legal prohibition shows that the law is not "arbitrary or unreasonable". - Social and constitutional goals of financial monopolies justify that their budget be earmarked for social expenditure; its reduction violates the P.C.	unreasonable intervention in the autonomous nucleus of competences of territorial entities. 1.D.O. Legislative antecedents presented the structural reform, but as an argument to claim a failure in the legislative procedure.
C579/01 172(30-41; 85-112)	Ministry of Finance: - Legislative antecedents technically supported by the critical situation of public finances of territorial entities (which would affect the macroeconomic policies of the state), justified the "rationality and proportionality of the measure". -Case law stated that the financial autonomy of territorial entities may be limited by the needs of the management of the macroeconomic stability.	- The evolution of the case law of the unitary state and territorial autonomy is used to justify larger legislative competences in financial and budgetary issues, when the measure is "reasonable and proportional" - Legislative antecedents and interventions on the macroeconomic crisis were accepted as proofs to declare the rules as "reasonable and proportional" - Textualism: the P.C. did not distinguish between investment and current expenditures - Contrary to past arguments of the Court, the rule was partially struck down because it was "too strict and not proportional" thereby violating the P.C. (362)	1 D.O. The rationing of public expenditures is constitutional because "special circumstances of macroeconomic difficulties" made that the test of proportionality and reasonability was "easily approved". 2 D.O. The central argument of the ruling recognized as "reasonable and proportional" legislative competences to intervene in the fiscal management of the own resources of territorial entities to preserve the macroeconomic stability. The Court should have declared the constitutionality.
C837/01 127 (37-42, 44-92).	Ministry of Finance and DNP: -Legislative antecedents explained the legislative purpose: the regulation of current expenditures of territorial entities to avoid the macroeconomic collapse and to strengthen decentralization -Case law: legislative competences are larger when they protect the macroeconomic stability.	- Textualism, purposivism - Res Judicata C540/01, C579/01.	D.O. were the same as in previous rulings.
L715/01			
C615/02 33	Ministries of Finance and Health: The intervention of the state in the provision of health services and the limitation of private sector	- Purpose of the rule - The rule was not rational and proportional because the reasons to limit the freedom of enterprise were not expressed; it is a disproportional administrative competence that violates the principle of reserve of law	Unanimous.

	initiative is based on: - the P.C. and constitutional case law - the purpose of the rule (the efficient and rational organization of the service to warrant fundamental rights)	(P.C.)	
C974/02 31	Ministry of Health: - the purpose of the rule was to rationalize the economy to warrant health services. This justified the limitation of private sector initiative.	- Purpose of the law -Textualism P.C. and Law 715/01 - International legal doctrine (Spain) - Case law (mainly dicta) The rule was unreasonable and disproportional because the principle of reserve of law was violated (P.C.).	C.O. not directly related with this ruling
C617/02 46	Ministries of Finance and Health: - the P.C. and case law recognize regulatory competences of the executive to develop organic laws on health issues.	-Textualism P.C. -Constitutional case law	D.O. not directly related with this ruling
C097/03 35	---	-Legislative and constitutional history -constitutional case law evolution -comparative law and case law on the delegation of legislative competences is limited. -general constitutional principles and legal certainty to limit the delegation. -The rule is vague and its finality was not expressed	C.O. not directly related with this ruling
C791/02 32	The Ministry of Health: - Case law supported the purpose of the rule: the rationalization of the social economy of community services.	-Textualism and case law related with general issues -Legislative antecedents, purposivism and P.C. textualism to explain the limits of economic freedom - Relevance of empirical analysis in constitutional case law to analyze the progressive principle in social security and in the management of its resources -Respect of the "jurisprudential line" C1165/00 quoted by IMF to affect the financial system of the sector. -The empirical analysis of the government (legislative antecedent) demonstrated the need of adjusting the distribution of competences to deepen the decentralization and to increase the efficient use of public resources. - P.C. textualism and case law: the law did not determine the parameters of the delegation. The court defined "constitutional criteria" to condition the constitutionality of the rule: the transfer was limited to 50% of the UPC-S until the law regulates the issue.	C.O. not directly related with this ruling
C566/03 38	The Ministry of Finance - Case law	- Textualism: P.C. and Law 715/01 - Case law evolution ("unattachability of the SGP"). - The constitutionality was conditioned as in C793/02 (Law 715/01 (18)) but it is not res judicata; possibly a precedent in education.	C.O. not directly related with this ruling
C568/04 28	The Ministry of Finance - Textualism: the P.C. gave discretionary competence to the legislator to regulate the form of the transfer of the	- Textualism P.C. and Law 715/01: the legislative competence is discretionary and may take into account the public finance situation, cash flow. The text of the law did not violate the P.C. - Empirical analysis: CONPES documents proved that	Unanimous

	SGP (under the budgetary procedure). - The unconstitutionality would create a bigger fiscal deficit whose control is a goal of the government to avoid macroeconomic crisis and the risk of defaults. DNP: - the distribution of the SGP accomplished with CONPES documents.	the amount of resources ordered by the P.C. were included in the budget. The form and terms of the transfers were constitutional and reasonable (the legislative discretion is accepted). -The appropriation up to an amount that would be transferred in each fiscal period is unconstitutional because the text is not clear and it is a discretionary estimation different from the rules of the P.C.	
C005/03 17	Ministry of Health: -The purpose of the rule was the access to health services. -case law	-P.C. :Violation of legislative procedure	C.O. not directly related with this ruling
L643/01			
C316/03	The Ministry of Finance - Health resources are not affected	-Constitutional antecedents -Textualism P.C. Law 643/01 Law 489/98-	
D1750/03			
C314/04 58	Ministry of Finance: - Legislative history supported the organic criterion to define the labor regime of public employees as occurred in C579/96. - The legislative purpose of ESE justified its special legal regime. -Arguments claiming the disregard of collective bargains did not refer to the rule but to the effects. - Case law supported the limitation of this right but protecting acquired rights. Ministry of Social Protection: - Case law: Labor regime is part of the restructuring (precedent). ISS: - ESE is a special category that cannot be assimilated to EICE. Its social object is not commercial or industrial. The assimilation is inconvenient and would create a problem of inequity with other ESE. - The purpose of the rule was to warrant the financial sustainability. -Case law: labor rights are	1- Violation of the right to equality. -Precedent on delegation of legislative competences to reform labor regime - the scope is based on international legal theory (Alexy) and case law of the European Court of Justice quoted by an APFR ruling. -case law doctrine defined the criteria to accept a differential measure (which was explained but not used). - Precedent: C579/96 (quoted by the challenge) was not “a relevant criterion to justify the similarity between ESE and ECIE”. The Court judged it as “insufficient and legally irrelevant”. By contrast the intervener’s thesis of the organic criterion based on the organization of the state to define labor regime was accepted. -Argument of convenience: Labor regime may be modified by law to satisfy “with flexibility the needs of the service”. -Case law (C 579/96) use to deny the same labor regime as ECIE. It was “an incomplete comprehension of the legal nature of ESE and ECIE”. The argument was the same used in C579/96 to reach a contrary decision: the social object (health service provision) did not allow the same labor regime as ECIE 2- Violation of acquired rights -Wide presentation of acquired rights and collective bargains agreements, based on the P.C., constitutional case law and legislative history. - The limitation of the right to present collective bargains by public employees is constitutional because a. the legislator defined “rationally and proportionally” labor rights. b. the practical and political difficulties to negotiate collective bargains -Case law has accepted that the labor regime is not an	2 D.O. The delegation of legislative competences did not include the modification of the labor regime.

	not irreversible.	<p>acquired right.</p> <ul style="list-style-type: none"> - The rule is of public interest and it did not regulate how labor rights were affected. From its reading the Court could not determine whether the law modified acquired rights (labor benefits). - Although expectations (not acquired rights) may be modified in a discretionary way, the Court presented the case law on the respect of good faith to ask the respect of “the trust generated to citizens vis-à-vis a specific legal regime”. The reform should then foresee the effects on concrete and non consolidated legal situations (expectations vis-à-vis regulation). The constitutionality was conditioned to the respect of legal benefits, even those of the collective bargains in force. 	
C349/04 82	<p>ISS: - Case law: One purpose of the reforms was the protection of the principle of employment stability and labor rights; another purpose was to warrant the continuity of the service, crucial to the state. Proofs: - Conpes 3219/03 - Financial and technical studies to reorganize the ISS and quantification of savings generated by the ISS convention of 2001.</p> <p>Ministries of Interior, Finance and Health: -The context: the agreement with the trade union was not a collective bargain but a political agreement without generating collective rights. - The financial sustainability of ISS is an objective and reasonable justification of the reform. -The constitutional purpose was the protection of labor rights and the continuity in the service.</p> <p>The Ministry of Finance: the rule reduced labor costs of ISS health services, which justified the rule. The wage level was protected but labor benefits dropped in the general interest.</p>	<ul style="list-style-type: none"> - Exhaustive presentation of the right to labor stability and labor regime in restructuring process, based mainly on P.C. and constitutional case law. - The drafting showed the legislative will to protect employment . -Precedent C 314/04: Labor benefits recognized by the collective bargains should be respected. -The ordinary meaning of the word “automatic” was the one adopted by the law, whose purpose was to prorogate the preexisting relation (contrary to the Ministry of Finance) -The constitutionality was conditioned to allow workers to continue with conventional benefits in force, including the transitional pension regime. 	<p>2C.O. C314/04 would have expressed that former ISS workers would keep all contractual and collective labor rights. Otherwise the P.C. is violated. 1 D.O.: The fundamental principle of legal theory was violated: the law should be logic and coherent; it cannot be ambiguous, confuse or vague. Legal fraud was committed because the spirit of the law was to preserve the ISS without violating labor rights.</p>
C559/04 121	<p>Ministry of Finance: The “integral agreement” (political that did not generate rights) with the trade union respected the principles of good faith and</p>	<p>1. The qualification of health services as essential public service was unconstitutional because the delegation of legislative competences did not include this competence. The analogy of Law 100/93 did not apply because the ESE were created after (Although C314/04 affirmed that their regime existed since Law 10/90).</p>	<p>3 D.O. supported the definition of essential public service of health; the legislative competences were not extra-limited because</p>

	<p>concertation. -The qualification of “essential” service only repeated Law 100/93 - The personnel policy sought to provide correctly health services, by using the experience of former workers. Ministry of Interior Affairs: Legislative delegation sought to warrant the financial profitability of the state which justifies the objectives of the ESE. ISS: The structural adjustment was unavoidable. CONPES document 3219/03 presented its convenience and necessity.</p>	<p>2 .The legal purpose of contracting with corporations created by ex-employees of ISS is constitutional because it sought the correct service provision based on contractual principles of transparency and objective selection. 3 The purposes of Law 790/02 and D1750/03 when established financial and social objectives of ESE were to rationalize the public administration to warrant the financial sustainability (case law dicta) -Those objectives are constitutional because they comply with the constitutional principle of efficiency in the provision of health services. -“Case law doctrine”: financial profitability should avoid discrimination (to comply with the constitutional principles of solidarity and universality). - The right to health should be protected. The APFR case law would give the scope of this rule, vis-à-vis constitutional principles; its constitutionality was conditioned to this balancing.</p>	<p>Law 100/93 recognized this quality before. 1 C.O. defended striking down the rule because this definition may have autonomous effects related to the right to strike. 1. D.O. and C.O. health is a universal public service not subordinated to financial considerations.</p>
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5.6.1 General Comments on Judicial Review Case Law on Health Issues

Several comments apply to the totality of the rulings. At first sight, any argument seems to find support in whichever article of the P.C. but also seems to find constitutional case law that supports it. It is the rule that the Court supports its arguments with its own case law (which in the majority of the cases is not precedent). There are very long quotations and in many cases the relevancy for the concrete case is minimal. In several cases the large volume of general issues presented in each ruling contrasts with the short reasoning presented to decide the particular case, and in some cases the decision does not even have a direct relation with the huge amounts of quotations referring to very vague issues. In addition, the long sentences allow to be quoted practically in any sense, and therefore they can be used to support contradictory arguments.

The syllogistic structure of reasoning is not dominant and instead, textualism and purposive method dominate, although the decision always refers to the reasonability and proportionality of the challenged rule. When the Court identifies a purpose, not necessarily based on the P.C. or the law, it seems that the rule has high possibilities to be constitutional. The sentences seem closer to a political discussion than a legal analysis. Almost every constitutional rule is considered as a “principle” and they serve to argue in any direction, giving the impression that a large judicial discretion exists. The use of the terms “reasonable and

proportional” is a common place in the arguments of the challenge, the interveners and the Court.³⁶⁶ The test of proportionality and reasonability is mentioned almost in all the cases as the way to conclude whether a rule is constitutional or not but, as explained in chapter two, the Court did not adopt a specific international trend, on the contrary, it is not rigorously performed. Apparently the rationality and proportionality of a rule means that the Court shares the political or discretionary decisions of the Congress.

5.7 The APFR case law

The enforcement of the right to health through the APFR is accepted by the Constitutional Court when a health service is necessary to guarantee a minimal quality-of-life, i.e. it is enforceable when the right to life and/or personal integrity is threatened. The economic consequences of this way of enforcement are not negligible because, as Cepeda confirms, the “vast majority of cases analyzed by way of the APFR concern ESC rights, and among these, the right to health is in the first place” (Cepeda, 2004b:620). The impact of the judicial review case-law on the sector was not as notorious as has been the case of the APFR case law. The enforcement of the right to health has had non-negligible fiscal and economic consequences³⁶⁷ as the APFR case law has been mostly privileging individual rights without considering budget constraints. The use of this “related thesis” to enforce the right via the judiciary has been generalized without a systematic criterion of application and hence, the conversion of ESC rights in fundamental rights has been pressuring public budgets (Arango, 2005 quoted by Castaño 2006:26).

The Court is accused of regulating the health sector through a mechanism established for concrete cases (the APFR). The Court’s counter-argument refers to the omission of the legislator, who until now has not enacted the statutory law to regulate the scope of ESC rights. It affirms that constitutional rules cannot be ignored and imposes therefore its own equality criteria (García and Uprimny 2002), aiming to correct the redistributive competences of the State (Arango 2001; Cepeda 2004b; Uprimny 2002). This argument shows the conflict between individual rights and welfare policies, but also shows that the judiciary (not the most suitable power to correct the redistribution of scarce resources) tries to enforce directly its own vision of constitutional principles. Furthermore, the Court orders expenditures not covered by the planned budget, and therefore new resources have to be allocated to accomplish the adjudication, at the cost of other policies or fiscal commitments. Several institutional conflicts emerge: first, the judiciary is normally

³⁶⁶ Public entities argued frequently the ineptitude of the challenge due “to the lack of clarity and arguments”.

³⁶⁷ The case of Colombia is not particular. The experience of other Latin American Countries was analyzed by Castaño, particularly the cases of Mexico and Argentina (Castaño 2006: 10-1).

competent to solve specific cases, but due to the inactivity of the other branches to regulate the justiciability of ESC, it is assuming this competence through its case law.³⁶⁸ Second, despite the difficulty of enforcing the duties of fulfillment of ESC rights not yet defined, the Court is applying vague norms in benefit of those who have enough capacities to pursue this justiciability; a generalized regulation would protect the poor better. Third, the activism of the Court is accused of producing inefficiencies when it stimulates contract breach (Palacios, 2001b:7), or obstructs the use of scarce resources in a planned way. The first analysis of the APFR related to ESC rights focused on the period 1992 – 1996. It showed the following results:

- The Court conceded, as a percentage of total demands, more APFR than any other judicial instance (García and Rodríguez, 2001:432-6). One of the reasons thereof is the selection of the cases; the Constitutional Court has a discretionary competence to select cases in which “ordinary judges do not perceive a violation of a fundamental right” and using the revision to define and motivate new circumstances in which fundamental rights are violated. This situation contrasted with other courts’ opinions, as those of the Council of State where 93% of these actions were denied because of procedural reasons or the Supreme Court of Justice where 94% of the cases were denied, of which 56% for the same reason (García and Rodríguez 2001: 445).
- Judicial decisions are not effective to change the future conduct of the State, given that 80 % of the APFR continued to be presented against its institutions (García and Rodríguez 2001:429).
- The absence of procedural unification criteria promoted the over-utilization of this action, distorting its constitutional goals.³⁶⁹ One reason is that the Court bases its competence on the open model of fundamental rights of the P.C., which allows defining their limits and scope. In the name of the effectiveness of rights, a large judicial liberty is created without the duty to respect precedents (García and Rodríguez 2001:453-4).

From this study, two sorts of cases of ESC rights justiciability were distinguished: the first implies the request of a payment of social duties (i.e. a duty created by contract or by an administrative regulation); this is not seen as judicial activism, because new obligations are not created.³⁷⁰ The second are situations in

³⁶⁸ This is one example of the (theoretical) criticism to this sort of judicial activism because the judiciary does not study all the cases but only those presented to them (Posner, 1998; Rubin, 1999; Bouckaert, 2002).

³⁶⁹ There are many recurrent conflicts because a large number of actions have the same causes.

³⁷⁰ The APFR is considered as a good influence on the administrative efficiency because it has become a routine resort to recover debts from the State (García and Rodríguez 2001:468-9).

which the Court grants a right after having been rejected by law or by the administration; they represent 55% of all cases on ESC rights (García and Rodríguez 2001:465).³⁷¹

In the present research, APFR case law that involves the delivery of a health service was analyzed quantitatively to show their volume and potential impact on the macroeconomic goals of the IMF arrangements.³⁷² Those presented against private persons were included because in many cases the Court ordered to supply the service even when social security contributions were not paid and the EPS had to be compensated by FOSYGA resources. The Court has justified its APFR case law by referring to its corrective role with respect to the redistributive policies of the State. However, it only decides cases selected for revision, which are a small minority, i.e. the Court is trying to regulate a general situation through a mechanism established for concrete cases, based on the legislative omission of not enacting the statutory law that should regulate the scope of ESC rights (García and Uprimny 2002). A screening of the total amount of APFR case law produced by the Court during the studied period produced the following figures: On average, APFR case law in health represented 30% of the total number of APFR rulings of the Court and 22% of the total number of Court case law (including judicial review). Further analysis would be needed to establish whether it corresponded to an increase in the total number of APFR rulings presented in the whole country, or whether it reflects the preferences of the Court, provided its discretionary power to select the cases to be revised. It is not within the aims of this study to analyze the APFR countrywide as it focuses on the behavior of the Court.

Table 5.9 APFR in health as a percentage of the Constitutional Court case law.

	2000	2001	2002	2003	2004	2005	2006	Average
Number of APFR rulings on health provision	287	243	229	267	316	349	288	283
As a percentage of the total number of rulings	16%	18%	20%	22%	25%	26%	26%	22%
As a percentage of the total number of APFR adjudications.	21%	25%	30%	31%	35%	35%	34%	30%
Judicial review sentences as % of total number of sentences	23%	27%	31%	28%	28%	25%	23%	26%

Source: own calculations from data of the Constitutional Court (www.corteconstitucional.gov.co)

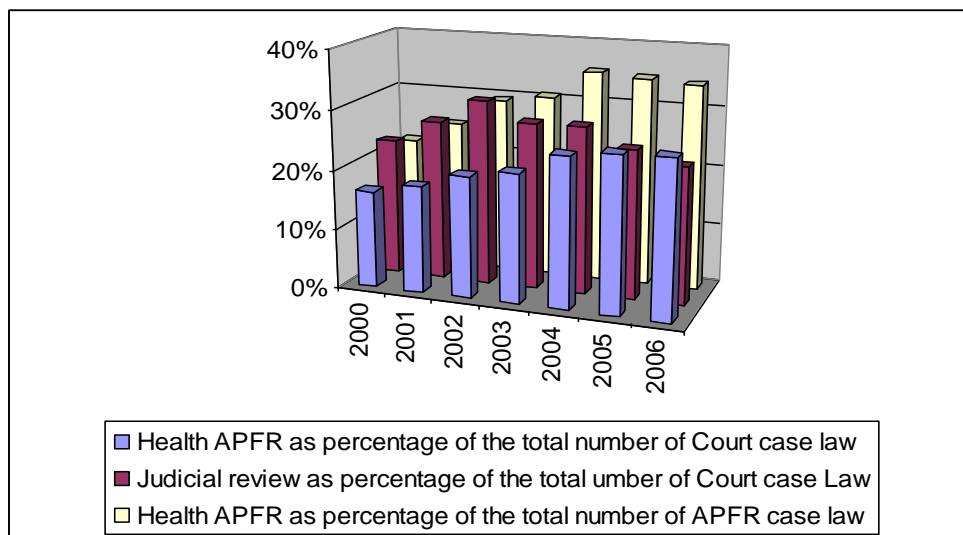
Health APFR has been growing in importance over the years, particularly since 2004 when it represented more than 25% of the total Court case law. Since 2005, it exceeded judicial review case law. Using the

³⁷¹ APFR rejection was mainly based on lacking budgetary resources and the protection of legal certainty. In the following years the rejection was mainly based on procedural failures of the APFR

³⁷² APFR classified as social but involving freedom and collective rights were excluded.

number of rulings as an approximation, apparently the time spent by the Court on health cases is close to the one spent on its main competence, which is the constitutional analysis of statutes. Despite the fact that the percentage of APFR rulings revised by the Court dropped since 2002, the part corresponding to cases of health provision shows the opposite behavior. It grows continuously, exceeding 30% of the total APFR case law, and 20% of the judicial review case law. The importance of the latter grew in 2001 and 2002 but then decreased continuously until it reached in 2006 again the level of 2000, corroborating the importance of the APFR in the Court's work.

Figure 5.2 APFR in health as percentage of the Constitutional Court case law.



Source Table 5.10

The percentage of conceded rulings, that order the protection of the right to health through the supply of a health service, is almost constant: 71% on average, being especially relevant since 2004 (table 5.10). Negative decisions are slightly diminishing, being the lowest in 2006, and representing on average 18%. Two additional types of decisions, although minority, are relevant. A third type refers to petitions that have overcome facts, which means that health services were provided before the end of the judicial procedure. On average they represent 8% of the cases. This figure could partly reflect the impact of the APFR on the efficiency of the health service provision, because in a number of cases, the provider, knowing the tendency of the Court case law, did not wait for the ruling of the Court requiring the provision of a service, being afraid of administrative and economic sanctions. However, the figures do not show an increase, and therefore apparently APFR case law is not influencing notoriously the behavior of the health sector, in

terms of administrative failures. A fourth type refers to cases in which the Court declares that the petition lacks an object, mostly because the solicitor died during the process. On average it represented 3% of the total number of rulings, being notoriously low in the last two observed years (2005-2006). This observation might show a positive influence of the APFR on the speed of service provision in crucial cases. But the enactment of Law 972/05 is also relevant because it ordered to warrant health services for catastrophic illnesses³⁷³ and prohibited the entities of the social security system in health to deny health services to those patients.

Table 5.10: APFR case law classified by type of decision

	2000	2001	2002	2003	2004	2005	2006	Tot.	%
Type 1 decisions: conceded ³⁷⁴	183	161	161	172	235	267	227	1406	71%
% of total number of health related APFR adjudications	64%	66%	70%	64%	74%	77%	79%		
Type 2 decisions: denied	81	50	39	58	47	51	38	364	18%
% of total number of health related APFR adjudications	28%	21%	17%	22%	15%	15%	13%		
Type 3 decisions: overcome facts	14	28	16	24	26	26	21	155	8%
% of total number of health related APFR adjudications	5%	12%	7%	9%	8%	7%	7%		
Type 4 decisions: lack of object.	9	4	13	13	8	5	2	54	3%
% of total number of health related APFR adjudications	3%	2%	6%	5%	3%	1%	1%		
Total	287	243	229	267	316	349	288	1979	100%

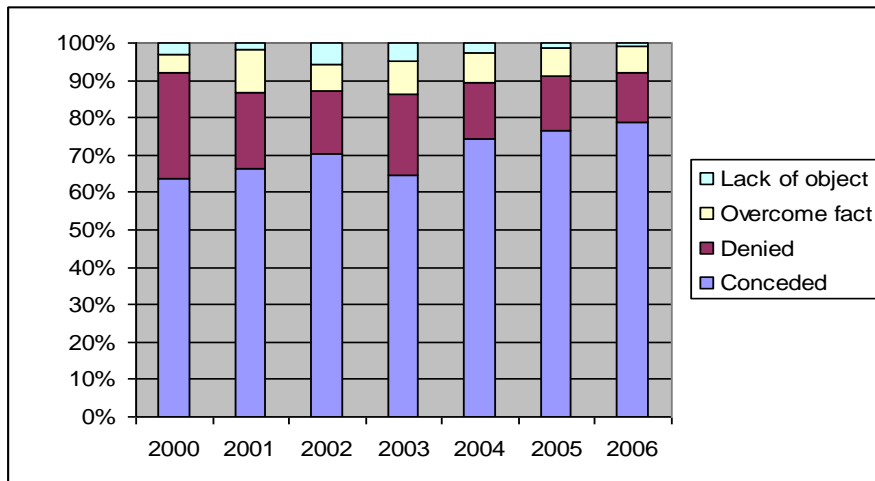
Source: Table 5.10

The probabilities of obtaining a favorable decision when the APFR is revised by the Constitutional Court are high and this probability is growing over time, which might be one of the reasons for its over-use. While a general regulation concerning the scope of this right is not enacted, many people tend to prefer to use this instrument rather than to accomplish the regulations in force. The correction of the administrative inefficiency in the sector seems to be small and did not show signs of improvement. However, as it was said, for critical cases it seems that services are being provided without waiting for an APFR ruling. The enactment of Law 972/05 may allow concluding that the ruling is not longer needed to request the reimbursement by FOSYGA. However, this may also show that the APFR is being used more for non-critical cases in which the right to health is not easily connected to the right to life or human dignity, as the Court stated in its doctrine on justiciable rights.

³⁷³ It refers to cancer, kidney insufficiency and AIDS; the latter being considered as a national priority.

³⁷⁴ Before 2005, some rulings partially conceded the petitions and they were also included.

Figure 5.3 APFR case law classified by type of decision



Source: Table 5.10

As the study of García and Rodríguez (2001) suggested, a distinction can be made between cases in which private or public suppliers did not accomplish contracts and regulations and denied health care, from cases where the solicitors are outside the system i.e. contributory or subsidized regime, or where they ask more than legally conceded. A second analysis was performed to identify the arguments (reasons) used by the Court to concede or deny the APFR. This allowed identifying how far the Court has gone as regulator in this sector, respecting or replacing general regulations. A quantitative analysis of the arguments of the Court was based on the following categories:

a. Treatment non-POS: Included situations, in which a treatment, a medical procedure or provision of medicines or medical care instruments not included in the POS for both the contributory and the subsidized regime, were ordered to be provided. The Court did not apply legal regulations and applied the P.C. directly. This category has been growing in importance maybe because non-POS petitions for non catastrophic pathologies are growing, and also their concession (T1223/05).

b. POS/Administrative failure: Included cases where an administrative (bureaucratic) procedure impeded the health service supply. Problems (negation or moratorium) with the affiliation to one of the health service regimes, the provision of the service were included as well as administrative interpretations that impede the continuity of treatments.

c. POS/Minimum contribution: Included cases where the solicitor did not pay the minimum contribution before asking for certain procedures. The Court did not apply contract regulations and applied directly the P.C. The EPS had to request the difference from FOSYGA. It is a new way to get subsidies not included in legal regulations (T806/98).

d. POS/Delay in contribution payment by employer: The negation of the provision of a health service was due to the moratorium in the payment of monthly contributions. Mostly the debtor is the employer, but it included also cases of independent workers. The Court ordered the provision of the service and the EPS had to demand the payment from the debtor (T181/00).

e. Procedural failure: Included failures committed by the actionist in the administrative or judicial procedure. Some not exhaustive examples are: the use of the APFR when another action is appropriate, the lack of proofs, the lack of administrative conditions to request a service, or temerity actions (when the entities did not commit any fault). These cases could have been included in other categories, but the Court only analyzed the procedural failure. Therefore, this category was created.

f. Pre-paid medicine conflicts: They are APFR which involved a private contract between the provider of health services and the solicitor. Normally they are voluntary, they cover higher risks than the POS and they are regulated by private law. The Court intervened in these contracts in some cases arguing that health is a public service which cannot be kept in the private sphere (T118/00).

g. Health service failure: It referred to cases where the health personnel did not supply the service on time or wrongly. Although it is different from the issue of medical responsibility, erroneous diagnoses was included here when they obstructed the provision of the service. These situations were very difficult to distinguish from administrative failure because, in many cases, the action of the administrative authority was involved.

h. Absence of economic capacity included cases of persons who i) were not able to make the co-payments for some services; ii) were outside the system and lacked capacity to pay; iii) were special constitutionally protected groups (children, handicapped, elderly). Petitions involving children were

accepted in almost 100% of the cases, because the Court tended to interpret their right to health as fundamental in almost any case. The Court decided which persons have to be subsidized this way, even if the solicitor did not follow the appropriate administrative procedure.

J. State Responsibility: were cases of persons who were outside the system but whose situation was caused by an action of the State. These cases included: prisoners, soldiers that suffered an illness derived from their professional activity, and people displaced by violence. Some APFR were presented, e.g. seeking to address health problems derived from overcrowded jails (T257/00).

K. Other: This category included cases that involved health provisions that could not be classified in the main categories: job relocation for health reasons; re-liquidation of monthly contributions; disputes over medical criteria; monetary reimbursement of pre-paid health services; declarations of disability, conflicts referring to special assurances for car accidents or professional accidents; etc.

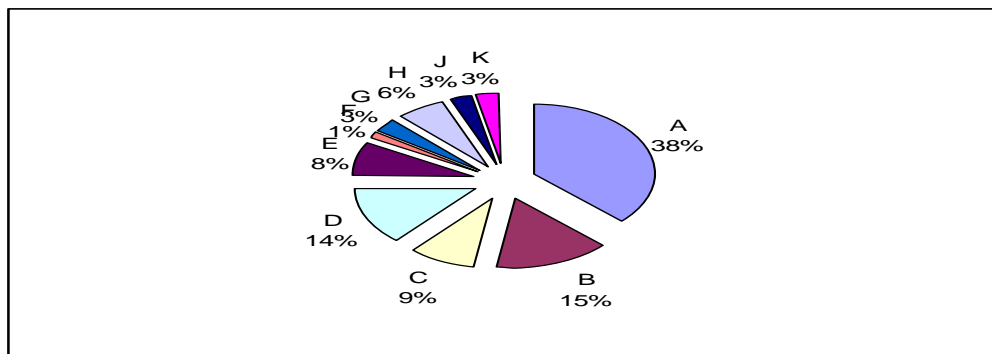
Table 5.11 showed the results of the application of this classification, based on the revision of the contents of the totality of APFR sentences referring to health service provision. The share of each of those categories is visualized in figure 5.4 which summarized the seven years observed. First, the importance of the share of rulings deciding petitions on treatments not included in the POS (A) was notorious. The lack of minimum contributions (C) and the lack of economic capacity (H) can be counted together with category (A) because they all requested services without a legal entitlement. Their combined share amounts to 53% of the total Court APFR case law. In those cases where the Court conceded the protection, it ordered the non-application of legal rules and instead compelled the provision of the service based directly on the P.C. The Court, acting as a regulator, indicated the cases in which the solicitor may get a subsidy; the cost of these decisions had to be paid by FOSYGA. They were thus cases in which legal and administrative procedures to obtain a subsidy were not followed, but the APFR was used instead.

Second, cases in which the APFR was used to avoid arbitrariness and inefficiency of the health service providers represented 18% of the total number of APFR: 15% were due to administrative failures (B) and 3% to health services failures (G). These situations implied the non-compliance of contracts and regulations by private or public suppliers who deny health care and should indeed be addressed with this instrument. As explained before, these percentages did not necessarily apply to the rest of the country,

because the selection of the cases revised by the Court is discretionary and not necessarily proportional with respect to the distribution of the cases countrywide.³⁷⁵ A previous study estimated that most of the APFR requested a health service included in the POS, and that 71% were caused by administrative failures (Defensoría de Pueblo, 2004).

Third, the category referring to the delay of the payment of employers' contributions (D) (14%) would have been justified by the economic crisis at the end of the decade. These cases corresponded more to a typical judicial controversy, but to protect urgent health rights the Court accepted (or not) that the conflict could have been solved through the APFR instead of the ordinary jurisdiction.

Figure 5.4 Distribution of APFR according to the argument (reason) to decide (2000-2006).



Source Table 5.11

An in-depth analysis of yearly figures shows the following results for the group corresponding to the “judicial activism” of the Constitutional Court (A, C and H). The Non POS treatments reached a share of 30% since 2001, and were superior to 40% from 2002 until 2005. In the last year its share slightly dropped but without losing its first place. Petitions seeking the provision of a health service without the minimum of contributions (C) were more important in the first two years (the crisis years), then diminishing notoriously, and being again more important in 2004. Finally, the lack of economic capacity (H) was notoriously low in 2000 and 2004, but increasing its importance in the last two years.

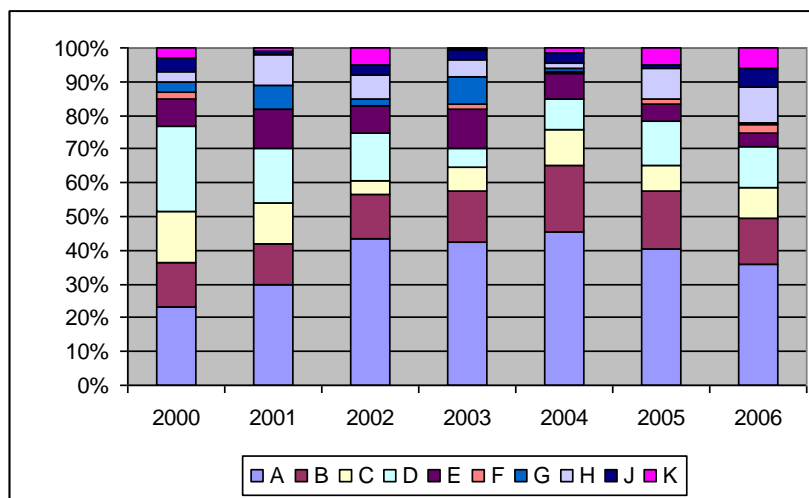
The group referring to administrative failures in the service supply (B) increased its importance, particularly in the period 2003-05, whereas petitions based on medical failures (G) almost disappear from 2004

³⁷⁵ The total number of APFR revised by the Court during 1992-2003 represented 2.81% of the total number of actions presented countrywide (cf. www.constitucional.gov.co).

onwards. The reason may be that most of the time the delay in the health service provision is due to administrative reasons that impede the contact with health workers. Conflicts with them are usually present during or after the service provision, and they are solved by the action of medical responsibility.

Third, the category referring to the delay of the payment of the employers' contributions (D) was particularly high in 2000-01, and then dropped in 2002. It showed, however, an increase in the following years which may reevaluate the justification of the economic crises.

Figure 5.5 Distribution of the Court APFR arguments (reasons) per year.

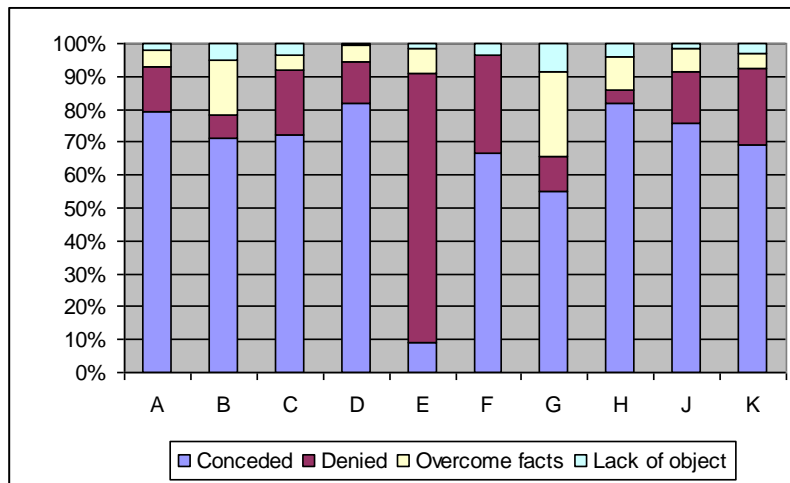


Source Table 5.11

The budgetary burden is important, the more because many of these cases included the so-called "catastrophic" illnesses, which despite Law 972/05 have not disappeared from these judicial controversies. However, since 2005 they are not the most important cases anymore. The drop in the percentage of those cases may have been compensated by other pathologies, not necessarily affecting in an immediate way the right to life or dignity. The most remarkable from a potential budgetary perspective, was the percentage of conceded rulings in cases identified as judicial activism. In category A, the conceded cases represented 80%; in category C they were superior to 70%, and in category H they exceeded 80%. Cases that may influence the efficiency in the service (B) were conceded in 70% of the cases, whereas for cases concerning medical reasons almost 50 % of the petitions were conceded. In contrast, cases in which the APFR petition presented a failure were denied in more than 80%.

Conceded APFR based on the non compliance in the payment of contributions was also superior to 80% of the total number of analyzed cases in this category. Although it is a typical judicial controversy, it put pressure on the budget because it ordered the supply of the service even if one of the parts did not comply with its duties. Service suppliers had then to recover the cost which is not immediate and it may be an incentive for the non compliance of contracts.

Figure 5.6 Distribution of APFR per type of decision and per argument, consolidated (2000-6)



Source Annex 5.2.2.

Some of the conclusions of a study promoted by the Public Ministry may clarify some of the results of the present analysis: i) When a POS procedure was violated, the Court considered it as an automatic violation of a fundamental right (T089/03 quoted by Procuraduría 2008:150). This would have an incidence on the results of APFR conceded by an administrative failure. However the yearly ratio did not show a big variation, except for 2004 when it was higher than the other years. ii) The Court delineated the criteria to concede APFR requesting non POS treatments (Procuraduría 2008:159; López 2008). This may have increased the degree of predictability of APFR case law although it is not clear whether those criteria are generally accepted.

5.7.1 Comments on the budgetary impact of the APFR

The Ministry of Social Protection presented striking figures on the recovery of the APFR (table 5.12). More than 52% of the recoveries are expenditures related with non-POS treatments. The causes of other recoveries were not specified. These figures show that despite the economic crises at the end of the

nineties, the use of this action continued to grow for other reasons. A more plausible explanation is that it was easier to obtain subsidies this way than by following the administrative procedures. Moreover, it was a new way to obtain subsidies for people who were in the contributive regime but asked for treatments or medicines not included in the POS. The beneficiaries of those subsidies cannot be classified as poor and most of them are those with enough capacities to present the action, i.e. they are not necessarily the most needed, but it just seems easier to obtain subsidies following the judicial way instead of following the political way (see Uprimny, 2007). This behavior is supported by APFR case law that does not necessarily help with the rational improvement of the system; on the contrary, they may help some people but may negatively affect the system as a whole. Some organized groups (e.g. pharmaceutical corporations) are accused of pushing the use of APFR to include new medicines in the POS (Castaño 2006:28). The EPS are accused of promoting the use of APFR to avoid the rationing and to report to the FOSYGA.

Some analyses suggested that more than 95% of the APFR are presented by citizens affiliated to the social security system and that therefore, their rights would have a major degree of justiciability than the rights of citizens outside the system (Castaño 2006:29). A more recent study found that 73% of the APFR was presented by the population covered by the contributive regime and 3% by the population benefiting from the subsidized regime (Procuraduría 2008:171). According to other figures, nine out of ten APFR are conceded and should be reimbursed by FOSYGA (Clavijo and Torrente 2008:18). Despite those figures, defenders of the APFR insist in its justiciability supported by the international law system (T860/07 and López 2008:20).³⁷⁶ However, some of them accept the empirical evidence and admit that the APFR may also increase inequity; they agree that the best way to warrant universal coverage of good quality is through general regulation (Procuraduría 2008:171, 179). Some admit also that the “jurisprudential” POS (created by the APFR case law) is an open system contrary to the legal (administrative) POS, benefiting only the petitioner of the APFR and not the whole population, and negatively affecting service providers (López 2008:45).

Table 5.11: Number of APFR recovered from the State (FOSYGA)

Year	Number of recoveries presented		
	Non POS treatment	APFR	Total recovery
2002	35.185	33.801	68.986
2003	86.267	46.903	133.170
2004	90.853	65.935	156.788

³⁷⁶ The evolution of the constitutional case law on the right to health is synthesized by (López M. 2008:23-43).

2005	139.603	144.411	284.014
2006	49.170	74.043	123.213
Total	401.078	365.093	766.171

Source: Data base of the trust Fidyfosyga (2005 Management Report 2005 April-May 2006) quoted by the Ministry of Social Protection 2006.

Some economic studies concluded that budgetary restrictions are also due to the bad implementation of legal reforms and the non-accomplishment of the legal parameters by some actors (public hospitals and people obliged to contribute to the system). In 2005, the number of affiliations to the contributive regime dropped, which contrasted with the good economic performance. The evasion supposed to be caused by the informality of the economy, pushes the public expenditure in health (Lozano et al 2007:17).

Another issue is that the recovery of the costs by the EPS is not automatic and mainly public hospitals are affected. This situation has an important impact on the deficit of public hospitals and its apparent inefficiency, because these debts increased dramatically their deficit.³⁷⁷ The role of the APFR case law is relevant, because it has systematically increased medical costs due to the “jurisprudential” enlargement of the POS, which are covered by the state through FOSYGA (Clavijo 2009:23). 73% of the outstanding bills of public hospitals in 2006 were FOSYGA reimbursements due to the accomplishment of APFR case law, and the delay in these payments was estimated between 9-12 months. Moreover, procedural discussions impede that 100% of the cost of the APFR case law be reimbursed³⁷⁸ (Carrasquilla 2008:20-4). Adding further complexity to this relationship between the judiciary and the regulating authority, a case law of the Council of State deciding Popular Actions³⁷⁹ accepted the argument that these delays in the reimbursement to the ESP affect the “administrative spirit” and the access and provision of health service and that therefore, the principles of efficiency, universality and unity are being violated. The situation was qualified as a “state of things” contrary to collective rights. The Council of State ordered that recoveries in moratorium should be solved by FOSYGA within two months and that moratorium payments should be solved within one month.³⁸⁰ This problem affects not only public hospitals and, therefore, it is not sufficient to justify the continuation of supply subsidies because with those resources public hospitals provide their services each year to less people and, consequently, at higher costs. A comparative analysis of both

³⁷⁷ E.g. between January and June 1999 the ISS spent COP 15.878.683.984 and FOSYGA reimbursed only COP 10061642 (0.063%). Cf. Sotelo (2000:42).

³⁷⁸ APFR rulings from the Constitutional Court grant the right to obtain the reimbursement from FOSYGA.

³⁷⁹ This is another constitutional action created by the P.C. (88) in 1991 to protect collective rights.

³⁸⁰ The challenge was presented against the Ministry of Social Protection which regulated the procedure for the reimbursement by FOSYGA (Council of State, Third Section No. 25000-23-25-000-2005-00355-01 (AP) 21.02.07). The method of this ruling is quite similar to the one of the Constitutional Court, quoting foreign doctrine and based on principles.

subsidies in the period 1996-2003 showed that the decrease in supply-side subsidies was not reflected in an equivalent increase in demand-side subsidies, and in contrast, the expenses of the contributory regime increased by 8 percentage points of the total health care expenditures reaching 58,5% (Clavijo and Torrente 2008:12). Table 5.12 presents the evolution of demand and supply subsidies.

Table 5.12 Health coverage of the subsidized regime and population treated in public hospitals with supply subsidies

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Subsidized regime	12.5%	15%	17.5%	20.9%	22.4%	22.5%	25.7%	26.1%	26.6%	34.3%	40.4%
Supply subsidies	27.6%	25.8%	24.6%	24.9%	23.1%	23.5%	22.1%	21.9%	21.2%	16.5%	13%

Source: Lozano et al. 2008:16

A recent study found that health care coverage increased from 28% at the beginning of the nineties to 86% in 2006. The coverage of the subsidized regime increased from 12.4% to 46% and the coverage of the contributory regime grew from 13% to 40%. Special health care programs (e.g. the military) increased the total by 2% to reach 88% of the national population.³⁸¹ However, the contributive regime covers only 55% of health costs, which may be affected by a growing informality in the labor market (Clavijo 2009:17). This has been attributed to Law 100/93 which placed the burden of the health care financing mainly on the public budget. This would even be accentuated if the goal of universal coverage were to be reached by 2012 (Clavijo 2009:20).

Law 715/01 ordered that the SGP earmarked for health (24.5%) should be allocated to the subsidized regime to reach universal coverage, to public health programs and to supply subsidies. After this reform, the SGP gained importance in the financing of the subsidized regime vis-à-vis the resources of FOSYGA, of the central government and of own resources of territorial entities. As the Council of State observed, the total amount of resources earmarked for health are not included in the budget and therefore the main reason to limit the service is not the lack of resources (Lozano, Ramos and Rincón 2007:13). The enlargement of coverage of the subsidized regime is directly linked to the reform of the SGP and the strengthening of the management capacity of territorial entities, and negatively associated with poverty and unemployment (Lozano et al 2007:17).

³⁸¹ Figures from the Ministry of Social Protection show that in 2006 the contributive system represented 33,7% and the subsidized regime 40,4%, leaving almost 26% of the population without coverage (Carrasquilla 2008:3).

However, in the presence of budgetary restrictions, it is a priority to enact of a legal framework defining the scope of ESC rights and limiting the discretionary competences used by the Court. In addition, the requirement towards the actors of the system (health service providers and contributors) to comply with the law is necessary. Law 1122/07 moved in this direction, increasing the contributions (of the employer), creating the National Commission of Health Regulation, strengthening the competences of the Superintendence of Health to solve the controversies among the actors in the sector, and creating incentives to the ESP to solve the complaints without the need of a judicial ruling. It would normally have an impact on the use of the APFR because a technical health board would solve conflicts between EPS and FOSYGA (Clavijo 2009:23). However Court behavior is showing an increasing activism. C463/08 decided that incentives established for cases of high cost illnesses should be extended to all non POS claims from both regimes (subsidized and contributive), which imply an automatic enlargement of the subsidized POS (Procuraduría 2008:164).

Moreover, despite this law, the Court distorted again the legal purpose because T760/08 ordered the Ministry of Social Protection, the National Commission of Health Regulation and the National Council of Social Security in Health to take measures to eliminate the “regulation failures” of health programs (POS and POSS) and, to assure its precision, its integral updating, the unification of both regimes and the appropriate and efficient provision of the service by the EPS (who together with territorial entities should promote and warrant the access of the service). It ordered the National Commission of Health Regulation to “adopt a program and schedule to unify gradually and in a sustainable way” both regimes, taking into account the epidemiological profile and the financial sustainability. The program should define i) mechanisms to rationalize the access to the service but assuring the coverage of needs and priorities; ii) disincentives for evasion; iii) measures to promote that citizens with economic capacity contribute, and measures to make shifts from one regime to another more flexible. More surprising was Annex II of the ruling where, the Court, seeking “constitutional pedagogy”, quoted many international instruments to protect fundamental rights (which did not necessarily apply in Colombia), which “allow to state that the right to health is fundamental”.³⁸²

For the government, when T760/08 sought universal coverage it increased considerably the financial effort, particularly for FOSYGA. An increase of these budgetary allocations reduces allocations to other social

³⁸² These rulings will not be further analyzed because they were decided after the period analyzed in this research.

sectors, financed basically by the SGP. The government criticized the scope of the principles of proportionality and reasonability used by the Court (Arias 2008). Wages are also considerably affected because the contributions would increase (Arias 2008), being an incentive for the informality and leading to a shrinking formal labor market which consequently would negatively affect the resources to the health system. The enlargement of the subsidized regime may also influence this informality because it is an incentive not to take a formal job, taking into account that they would be assured of a health program equal to the one of the contributors. These incentives, created by the Court, affected the system and impeded universal coverage, but also violated the law (Cárdenas 2008). In another (economic) analysis of the trends in APFR case law the opinion is shared that the only possible solution would be an increase of resources earmarked for health care. The question is whether this new burden would be assumed by the state or by the contributors (with the respective consequences for the labor market) (Carrasquilla 2008:30). Again, the Council of State³⁸³ intervened in the debate, and ordered in 2007 that the cumulated surplus of FOSYGA at the end of that year must be used to enlarge the coverage of the subsidized regime in the following year.³⁸⁴

Regarding health service coverage, judicial review case law has been more conservative and it upheld the constitutionality of rules that may not help to protect the right to health and that may contradict APFR case law. This case law accept the existence of both regimes, the contributive and the subsidized (C1032/06), complementary plans covered by the citizens (C099/98) and the intermediation in the subsidized regime (C489/00), issues that have been questioned in the APFR case law (quoted by Procuraduría 2008:178).

5.8 Preliminary conclusions

The period analyzed in the present research is characterized by an explosion of APFR case law (López 2008:50-1). This increase has also been interpreted as evidence of the increase in the violation of the right to health (Procuraduría 2008:67).³⁸⁵ What seems clear is that the Court is acting as a sort of super-

³⁸³ Council of State, Third Section No. 25000-23-25-000-2003-01252-02 (AP) 16.05.07.

³⁸⁴ The ruling was based on the proofs presented by the managers of FOSYGA showing that the budgetary execution in the period 2000-6 varied between 60.2% and 98.5% of the total of appropriate resources. Those surpluses were not invested in the enlargement of the coverage as Law 715/01 (50) and the P.C. (48) ordered. The Council of State rejected the arguments of the government and FOSYGA, based on the preeminence of the principle of macroeconomic coherence, because they are earmarked payroll taxes. The non execution of the surpluses of 2000-6 violated the P.C. (209, 365-6) and the collective right of access to the public health service (SU111/97). The CNSSS should implement this ruling as it did by Agreement 3777/08.

³⁸⁵ A well known case is the South African judicial enforcement of ESC rights which presented also institutional obstacles and which mentions as particularly problematic the implementation of judicial decisions recognizing ESC rights (see, Pieterse 2008), particularly in the context of budgetary constraints (Ely and Parra 2009:149). In Latin America, the justiciability of the right to health is also an issue in countries like Costa Rica, Brazil and Argentina (Ely and Parra 2009:149).

regulator, disregarding general regulations and procedures. Although the Congress and the government disagree with this situation, until the end of the observed period they did not take any measure to limit the discretionary action of the Court, which they have qualified even as arbitrary. Even if judges and jurists would like to give an absolute value to ESC rights, public expenditure restrictions are more than obvious. Some studies concluded that despite that Colombia followed the World Bank and IMF guidelines and increased considerably public expenditure, a large number of citizens are (still) not covered by the system and many of those that are in one of the systems cannot pay the co-payments (Homedes and Ugalde 2005:91), and this is largely reflected in the APFR case law.

However, the reform of intergovernmental transfers (SGP) may have produced positive effects. A study of 2007 evaluated the LA01/01 and Law 715/01 and concluded that the reform was positive from the point of view of macroeconomic stability because intergovernmental transfers were detached from the current revenues of the central government for the period 2002-8. As a result, the increasing tax revenue and better economic performance were not necessarily translated into expenditure (Lozano et al 2007:4). The analysis of the constitutional amendment to be approved in 2007 was supported even if they represented a larger transfer than the scheme supported by the IMF, because of its positive effects on fiscal savings. The reforms of 2001 limited the expansive tendency of intergovernmental transfers (SGP) (Lozano et al 2007:6-7). Following the statistics of the Ministry of Finance, they grew from 34% to 40% between 1994 and 2001. After the reform they stabilized at a percentage close to 36%, but without affecting the services of health and education because they continued to grow, due to the good economic performance (Lozano et al 2007:8). This reform made that the annual budgetary saving equaled 0,45% of GDP in the period 2000-5; and the total saving expected from this constitutional reform would be even larger (Lozano et al 2007:4).

However, the fiscal sustainability of the health sector is a serious problem because almost 55% of the costs are covered by the government and not by the contributory system or the selling of services. The level of public expenditure in health is already high and this makes its increase even more difficult. Special health care programs (the Army, Ecopetrol etc.) are an important burden for public spending (Clavijo and Torrente 2008:9). The payroll tax increased by Law 1122/07 seems insufficient to cover the needs of the system and therefore, the budgetary burden remains. The pressures on the labor market, as explained above should not be neglected (Clavijo and Torrente 2008:11).

Despite the high potentially distortionary effect of APFR case law for the budgetary equilibrium of the sector and for the public finances as a whole, these issues were not mentioned in the Structural Agreements, whose focus was on the restructuring of the sector (through the reduction of labor rights). Most of the measures suggested by the structural programs aimed at solving the short term distresses but not at improving coverage of the health sector. And even these short term aims were not necessarily met. Whereas several studies show a growing need to increase the earmarked resources for health to reach universal coverage, which is the mandate of the Court, the IMF is radical in stressing the need to diminish public expenditure allocated to health through the progressive reduction of the SGP and through the progressive privatization of the provision of health services. The regulators and the IMF focus on the reduction of the fiscal deficit, whereas the Court tends to concentrate on the insufficient coverage of health services.³⁸⁶ In the analyzed period, legal reforms in Colombia dealt with the resources assigned to the health sector and their distribution, but not with systematic reforms of the provision of the service. It is this vacuum that the Court fills through its APFR case law.

The present research shows, however, that although the role of the Court is certainly essential to protect fundamental rights of citizens, the Court is not the best placed to regulate particular socio-economic sectors and that its intervention can also produce dysfunctional and counterproductive effects. Judicial review rulings did not go against IMF recommendations. On the contrary, most of them defended the policies of decentralization and the freedom of enterprise in the provision of health services. But the recommendations of the IMF structural agreements do not seem to have had a strong normative character. In contrast, APFR case law sought to recognize rights against general regulations, producing concrete privileges and creating great disadvantages for those who were not in position to use the same methods. In addition, the APFR does not solve the conflict between the individual and collective perspective, hampering the explicit rationing defined by law (C.V. of T654/04, quoted by Castaño 2006:30, C671/02). It seems that in this sector the Court took into account the socio-economic context, presented by the government as a valid argument, in judicial review case law, whereas in APFR cases it stuck to its ideology, giving pre-eminence to the constitutional rights and principles. Definitively the Court is playing a more activist role through the APFR. Although it has theoretically a reduced scope (i.e. limited to concrete cases), it is influencing the results of public policies in an important way.

³⁸⁶ A study concluded that the structural adjustment programs of the eighties and nineties had a negative impact on the social indicators and particularly on the health sector in Latin America (Franco, Palma and Arvelaez 2006:297).

From an international perspective, the Colombian constitutional case law is not as original as it seems to be at the national level. The linkage of the right to health with civil and political rights (right to life, right to be free from torture or cruel, inhuman and degrading treatment, and right to respect for private and family life) has also been used in other countries such as India and by international institutions such as the European Court of Human Rights (ICJ,2008:65-6). The right to social security has also been linked to the right to property by the European Court of Human Rights and by the Interamerican Court of Human Rights (ICJ 2008:69). Although the APFR has been the corner stone of the legal reasoning of the Constitutional Court, in the ESC Rights Report of 2009 (12), presented to evaluate the progressive compliance with the duties of the ICESCR, this case law was not mentioned when referring to the right to health.³⁸⁷

³⁸⁷ It mentioned Law 812/03, the National Development Plan, Law 919/04 which prohibited the trafficking of human body parts, Law 972:05 which improved coverage for catastrophic illness, and Law 1122/07 which reformed the Social Security System in health to enlarge the coverage to the subsidized sector. As remarkable case law it quoted C355/06 on de decriminalization of abortion and T1237/01 on the special protection of the mentally ill (E/C.12/COL/5: 140-54).

6 ESC rights, the IMF and the Constitutional Court: the Restructuring of the State, Public Wage Indexation and Staff Cuts.

6.1 Some theoretical and contextual considerations

In this chapter, two issues linked with the modernization of the state and the macroeconomic goals of the IMF arrangements were analyzed. They are treated together because, although the emphasis is on public wage indexation, the policies of restructuring, particularly those involving staff cuts, have been linked by the IMF to the former. The restructuring of the state seeks mainly its downsizing and staff cuttings were one of the main tools, alongside privatizations of public utilities and commercial activities. Privatization was not analyzed because it is a vast issue not ruled by the Court and, therefore, outside the scope of this study.

This issue is of particular relevance because in the analysis of the effects of the Structural Adjustment Arrangements of the World Bank and the IMF on workers' rights it was found that those arrangements deteriorate workers rights ((Abouharb and Cingranelli 2007:183). Concretely, labor market reforms, privatizations and civil service reforms and the "shrinking of labor-intensive productive sectors had severely undermined the position of workers". The concrete results for labor rights were that employment diminished, jobs became more precarious, real wages dropped and income distribution became less equitable. Labor market flexibility and privatization without regulation were accused of producing these situations (SAPRIN 2004 quoted by Abouharb and Cingranelli 2007:183).

The World Bank is less signaled because in 2006, through its International Finance Corporation it adopted new standards to be accomplished in projects carried out by private enterprises. They are due to "respect the core labor standards established by ILO" (Abouharb and Cingranelli 2007:184). The analysis found evidence that the World Bank financed more projects in countries with a relatively high level of protection of labor rights whereas the IMF showed a contrary tendency (Abouharb and Cingranelli 2007:184). However, the policies of the World Bank are not totally coherent. The analysis found that in the World Development Report of 2006 (*"Equity and Development"*) the respect for the main labor standards was supported, by concluding that a strong protection of labor rights was crucial to achieve equitable growth and development. In contrast, in the Doing Business Report of 2006-7, the criterion of "friendliness to business" was used to classify the states according to their degree of flexibilization of the labor market (See Annex 1). In other

words, countries enforcing labor rights were sanctioned. Neither the OECD, nor the IMF ask the respect for labor rights as a condition to succeed in trade and investment (Abouharb and Cingranelli 2007: 188-9).

They further found that the length of structural adjustment programs affects labor rights³⁸⁸ and that the respect for labor rights by governments is normally indirect (by regulation) except when it refers to their own employees (Abouharb and Cingranelli 2007:184-6). Structural programs affect labor rights by i) reducing the role of the state in the economy which implies less regulation of labor markets (Abouharb and Cingranelli 2007:193); ii) Reducing public expenditure: subsidies, staff cuts and wage freezes or reductions of labor benefits (Vreeland 2003, Sisson 1986 quoted by Abouharb and Cingranelli 2007: 194); iii) limiting the right to collective bargains and the freedom of association (Abouharb and Cingranelli 2007:194). Some analyses concluded that international trade affects negatively labor rights whereas foreign investment improved them (Abouharb and Cingranelli 2007: 195).

In this chapter, those issues are developed in the case of Colombia. The constitutional framework is presented first, referring to pertinent statutes regulating staff cuts and public wages. Second, the opinions and evaluations in the IMF C.R. are presented to show the framework of the structural adjustments. Third, the theoretical framework is summarized together with the evolution of the constitutional case law on the issues. They are presented together because of the importance of the references to the court by academic opinion. Finally, the analysis of the case law (APFR and judicial review) in more controversial rulings is presented, following the methodology explained in chapter one.

6.2 Constitutional and legal framework

Labor rights were included in the P.C. as ESC rights. They are protected as follows: i) the legislator should enact a labor statute to warrant at least the fundamental principles of the P.C. (53): equality of opportunity for workers; **minimum basic remuneration, which is flexible** and proportional to the amount and quality of work³⁸⁹; stability in the employment; irrevocability of the minimum legal benefits; arbitration of conflicting rights; application of the favorability principle to workers, the primacy of facts over established formalities in issues of labor relations, guaranteed social security, capacity-building, leisure and special protection to vulnerable groups. The state should also warrant the right to an appropriate remuneration and the

³⁸⁸ For a summary of the international recognition of workers rights, see Abouharb and Cingranelli (2007: 185-6),

³⁸⁹ This concept is literally translated as “a minimum, vital and mobile salary,” which has been the basis of the constitutional case law defending the right to wage indexation.

“periodical adjustment of legal retirement benefits”. ii) International labor agreements ratified by Colombia are national legislation (53 P.C.). iii) The Law, the contracts, agreements and labor settlements should protect the freedom, the human dignity and the labor rights (53 P.C.). iv) The promotion of employment should protect handicapped persons (54 P.C.). V) The state should warrant the right to collective bargains (with legal exceptions) (55 P.C.) and to strike (except in essential public services defined by law) (56 P.C.); vi) a permanent commission formed by the government, employers and workers should promote pacific labor relations, the resolution of disputes and coordinate wages and labor policies (56 P.C.).

The civil service is regulated by the P.C. (122-31 P.C.). The most relevant issues for this chapter are summarized as follows: i) public posts should be determined by law or regulation, and their remuneration should be established by the budget of the entity (122 P.C.). ii) The character of public servant is defined by the P.C. (123 P.C.); iii) The P.C. typified labor relations with the state as follows: the career civil servants, the popularly elected personnel, the freely appointed and dismissed, and official workers (with labor contract); and the law may establish other types of relations (125 P.C.); iv) only one public remuneration can be received by a person, except in cases authorized by law (128 P.C.)

Fundamental rights have a special constitutional protection in case of declaration of states of exception (214 (2) P.C.), especially, labor rights are constitutionally protected by the establishment of the prohibition for the government to affect social rights of workers in case of a declaration of a state of emergency due to an economic, social or ecological perturbation (215 P.C.).

The P.C. established the distribution of competences to regulate those issues as follows: the legislator should i) determine the structure of the national administration which comprises the creation, elimination and merging of ministries, administrative departments, superintendences, public establishments and other public entities. This competence includes the regulation of the goals and the organic structure (150 (7) P.C.)³⁹⁰; ii) enact frame laws to (a) establish the goals and criteria for the government to define the wage level and labor benefits of public servants, members of the Congress and the military (150 (19 e) P.C.) and to (b) regulate the minimum social benefits of official workers (150 19 (f) P.C.). The President has complementary competences: i) the creation, merging or dissolution under the legal parameters of the

³⁹⁰ Law 489/98 regulates the structure of the state and given its vast contents, only relevant articles were mentioned when they referred to the study. The text may be found in www.secretariadelsenado.gov.co

posts required by the central level and the definition of their competences and remuneration. The government cannot exceed the budgetary availability for the respective service (189 (15) P.C.); ii) the elimination or merging of national administrative entities under the legislative parameters (189 (15) P.C.); and iii) the reform of the structure of ministries, administrative departments and other national entities, according to the principles and the general regulation defined by the law (189 (16) P.C.).

Finally, the P.C. (187) defined that the remuneration of congressmen should be annually adjusted, taking as a basis the “weighted average of the adjustments” of the remuneration of public servants of the central level of government, certified by the General Comptroller. This article was relevant for the development of the case law on public wage indexation.³⁹¹

The objectives and criteria established by the Frame Law 4/92 (2) to define the public wage regime were: i) the respect of acquired rights; i.e. the deterioration of wages and labor benefits is not allowed; ii) the respect for the administrative career and its enlargement; iii) the use of negotiation to improve services provision and work conditions; iv) the modernization and the improvement of the efficiency and the technology of the administration; v) the efficient use of human resources; vi) the competitiveness; vii) the duty of personal training; viii) the compliance with the general framework of the macro economy and the fiscal policy, and particularly, the budgetary limitations of each entity; ix) the level of the post (and grades) and the establishment of ranges of remuneration; x) the periodical evaluation based on the equity, productivity, efficiency, performance and seniority. Law 4/92 (3-4) determined the elements of the structure of public employment and ordered an annual adjustment of public wages, ordering its increase.

6.3 IMF structural reforms and the restructuring of the central administration: staff cuttings and public wage policies.

Structural reforms were very broad and included policies to increase the efficiency of the public sector. The issues analyzed here are those focused on the control of the fiscal deficit and on fiscal sustainability. Concretely, the analyzed policies referred to staff cuttings through the restructuring of public entities and public wage policies. IMF C.R. were screened to analyze the role and relevance of the IMF in these issues in the period under consideration.

³⁹¹ Law 4/92 (8) developed this rule, upheld by C095/00.

In **C.R. 99/149** a strict wage policy was proposed as structural reform to reduce the non financial public sector (NFPS) deficit in 2000, which was one of the macroeconomic goals, besides the economic recovery, the control of decentralized resources and the enforcement of taxes (CR 99/149: 13). Two measures of fiscal adjustment were included for 2000 as **Prior Actions**: a public sector wage freeze and staffing reductions, which would represent 0.5 of GDP in 2000. References to the distortionary role of constitutional case law on wage policy highlighted the “backward-looking wage indexation” ruled in 1999 by C815/99, according to which the minimum wage increase should at least compensate for past inflation (CR 99/149:22). The impact of the wage freeze policy was estimated by the Ministry of Finance and IMF Staff to correspond to 0.5 of GDP in 2000, 0.5 in 2001 and 0.3 in 2002 (CR 99/149:36). These goals could have been affected by the ruling although it was not mentioned in the report. In the Restructuring the State, complementary structural measures were mentioned including the privatization of the major public enterprises in the electricity, banking and mining sectors in 2000 and in telecommunications in 2001. Other public enterprises were expected to be downsized, implying a gradual staff reduction (CR 99/149:21).

C.R. 01/12 found that when the macroeconomic goals were analyzed, an “over-performance” was registered with respect to the program’s fiscal targets; the reasons for these positive results included higher income in the oil sector, the shortening of the transit period of taxes through the banking system, a postponement of investment projects, and a lower wage bill because of the wage freeze in 2000 for 70% of employees (CR 01/12:5 and 8). The annual budget law of 2001 sought to comply with the program’s NFPS deficit target of 2.5 % of the GDP, adjusting public wages below projected inflation and eliminating some government agencies.

C.R. 01/64 rejected ruling C1433/00 which ordered a public wage “increase corresponding to the previous year’s inflation” from 2000 onwards (C.R.01/64: 3,7). IMF staff qualified this wage indexation mechanism as a structural problem (distortion) for employment (C.R. 01/64:22), but also as the responsible factor behind less favorable fiscal results than expected because of the need to absorb the cost of compliance of C1433/00. By contrast, “the restructuring and downsizing plan for the public sector” advanced via measures to downsize the state, mainly the privatization of public enterprises, as well as the merger, closing or downsizing of public entities (CR 01/64:20). The bank restructuring process, including a privatization component, received technical assistance for the Monetary and Exchange Affaires Department –MAE- (CR 01/64:43).

C.R. 01/68 did not evaluate the structural benchmarks of the arrangements but presented a “selected issues” analysis. It presented some rulings of the Constitutional Court affecting the economic policy, mostly referring to laws and rulings enacted and ruled before the beginning of the IMF arrangements (see chapter three). Of relevance here is that the IMF referred to C1433/00 (CR01/68:13). It referred also to C702/99 which struck down the delegation of legislative competences by Law 489/99 to restructure the state (CR01/68:12). This evaluation analyzed also unemployment in Colombia and highlighted that real wages had increased during the decade and that the lack of credibility in the disinflation process in the nineties was linked to the continuation of the wage indexation based on past inflation (CR01/68:17). When the IMF analyzed the monetary policy, and more concretely the control of inflation, it remarked that the “imbedding in the institutional structure of the State” of the formal indexation of wages, pensions, taxes, mortgages payments and some financial instruments favored the persistence of a high inflation in that decade, a diagnosis taken from the Central Bank. The lowering of the inflation rate to single digits was due to the recession and crisis of 1999 and not to the implementation of specific fiscal and monetary policies. These positive institutional gains could be affected by C1433/00; moreover the IMF worried about the possibility of extending it to the whole public sector and the private sector (CR01/68:38). The IMF suggested changing the mechanisms of backward indexation for forward looking indexation (CR01/68:43).

C.R. 02/15 analyzed the evaluation of macroeconomic goals and highlighted that wage costs were lower than expected due to C1064/01 that reversed partially C1433/00 (CR02/15:8). In the evaluation of the structural reforms, the IMF expressed that the downsizing of the public sector, planned for the first trimester of 2001, was added to the downsizing of the past years at the territorial level (CR02/15:11). As a result, Appendix V on Structural conditionality mentioned that the downsizing of the central administration was replaced by a downsizing at the territorial level (CR 02/15:49). This is an example of how previous results are incorporated in the results of the arrangements, which increases the performance on the fiscal indicators, even if the programmed measures were not developed as planned. In fact, the reduction of the fiscal deficit was directly linked to maintaining wage moderation and the fiscal strengthening of territorial governments. (CR 02/15:14).

C.R.03/19, when analyzing fiscal policy, and more concretely the control of expenditures, highlighted the organization of a referendum to get a two year freeze on most current primary spending besides a

reduction in public investment (electricity, public transport and agriculture) (C.R.03/19:10). Concerning structural reforms, and particularly the labor market reform, the IMF concluded that “the minimum wage adjusted annually by past inflation is about 60 percent of the average wage in the economy” (as a result of C815/99), which is high for Latin American standards. This situation did not correspond to the purposes of the reform which mainly sought “more flexible labor market policies” to “spur economic growth and fiscal consolidation”, and to “achieve the government’s social equity objectives” (CR 03/19:21). The IMF argued that the high cost of the minimum wage indexation ordered by the Court and the high payroll taxes linked to wages would not be solved by the reform. Figures of DNP estimated that 150.000 new jobs would be created per year as a result of the reform (CR 03/19:15). In the redefinition of the role and size of the state in the economy, the IMF proposed to modify “the government’s own management systems”, the improvement of “budgetary practices”, the reinforcement of the “civil service career plan”, the streamlining of “the public sector wage bill”, the enhancement of the public sector contracting, and the reinforcement of the legal defense of the state (CR 03/19:54). The proposed reforms were: i) a bill to modernize the state by the delegation of legislative competences to merge ministries and other public entities, to incentivize public sector workers to return to the private sector, to eliminate the duplication of functions and to strengthen the use of information technologies in the public sector³⁹² (C.R. 03/19:15 and 54); ii) a reform of the civil service law, eliminating the current vacancies, reducing personnel by attrition by 10-12 % and reducing the non-military staff (C.R. 03/19: 54-5); iii) the strengthening of the legal defense of the state (C.R. 03/19:55); iv) the enactment of the fiscal transparency and responsibility law which would be the framework of the modernization and downsizing of the state³⁹³ (CR 03/19: 55).

This C.R. was a final report on the EFF arrangement. It highlighted that until 2002 Colombia “met the quantitative performance criteria with a notable over performance in the build-up of international reserves” (C.R.03/19:71). However many shortfalls were signaled: the fiscal consolidation was largely based on tax increases because government spending remained inflexible (CR 03/19:72). The IMF alerted that when the new government took office, the deficit of the combined public sector was nearly twice the EFF target of 2.6 % of the GDP. This was the result of a “shortfall on account of lower than expected economic growth and spending commitments made by the previous administration” (C.R.03/19:79). The realization of the

³⁹² Most of these measures were proposed by CONPES documents which did not pass via the Congress and whose real implementation is difficult to evaluate.

³⁹³ One proposition was to de-link this function from the administrative agencies and allocate this competence to a specialized bureau of the Ministry of Justice, using the competences of restructuring conceded by Law 489/98 (Archila 2000:5)

referendum was proposed to strengthen the public finances and to take urgent fiscal measures in a expedite way. The latter included an expenditure freeze of a large part of the public sector's current primary spending for two years at the 2002 level in nominal terms. The lowest wage and pension scales were excluded as well as military spending (C.R.03/19:79). In the Staff report for 2002 Article IV Consultation and Request for Stand By Arrangement, Law 790/03 that conferred legislative competences to the president to streamline the public administration was presented as a relevant advancement (C.R.03/19:3). The executive director for Colombia of the IMF concluded that the freeze of all public expenditure other than transfers to territorial governments (SGP), debt service and wages and pensions below two minimum wages were expected to save 0.7 percent of the GDP in 2003 and 0.6 percent of the GDP in 2004. The deficit was expected to drop to 2.5 % in 2003 and to 2.1 % in 2004 (C.R.03/19:3). The enactment of the civil service disciplinary code was also highlighted (C.R. 03/19:38).

C.R.03/181 presented as specific policies to cut “the overall public sector deficit, to arrest the rise in total public debt” and to restructure and downsize the NFPS (C.R.03/181:6). The hypothesis of the unsuccessful referendum or the postponement of the vote to 2004, would oblige the government to unwind the spending freeze in 2003, potentially widening the overall public sector deficit by 0.7 percent of GDP in 2003. Some “offsetting measures” were proposed such as postponing the increase in the VAT planned for 2005, and the enactment of a decree to maintain the freeze on general government wages, respecting C1064/01 (C.R.03/181:8, 11). The Annual Budget Law, together with C1064/01, allowed the government to keep most spending at levels consistent with the freeze until the vote on the referendum. The Court was accused to be one of the factors that delayed the referendum process (C.R.03/181:9) and the unclear outcome of the referendum was mentioned as a risk. Therefore, the IMF recommended maintaining a margin in expenditure commitments during the year until the results of the referendum. The memorandum of economic policies mentioned also the analysis of the referendum by the Court (C.R.03/181:42) as well as the continuity of the policy of gradual reduction of the workforce of the government, including mechanisms to protect the most vulnerable groups (C.R.03/181:45).

C.R.04/15 signaled as risks for the IMF arrangements, the potentially growing activist role of the Court in economic policy, i.e. the potential reversal of some governmental economic policies (C.R.04/15:4, 14-6). After the referendum vote rejecting the constitutional reform, the planned increases in spending on many investment projects were scaled back to save 0.4 % of GDP. Also, a contingency plan to freeze

government wages above a certain threshold by decree, seeking to reduce the wage bill by 0.3 % of GDP, was canceled because of C1017/03, which ruled that public wages had to rise by at least half the rate of inflation. This ruling was accused of obstructing this contingency measure and the possibility to keep the central public sector deficit in line with the original program target (C.R.04/15:10).

C.R.04/199 expressed that the macroeconomic framework for 2004 was better than envisaged. The projection of GDP growth was around 4% and oil exports were estimated at more than 4 % of GDP, which would benefit Colombia's growth and external position (C.R.04/199:8). Current spending was projected to rise to 26.5 % of GDP reflecting the mandate of C1017/03, and increases in net pension costs to 0.6 % of GDP. (CR 04/199:10). The progress in the structural reforms, particularly the restructuring of the state, was linked with the closure of 29 public entities, the elimination of 14.000 jobs and the adoption of stricter hiring procedures for public employees as a result of the development of the delegation of the legislative competences realized by Law 790/03 (C.R.04/199:5-6).

In **C.R.05/154**, the strengthening of growth and employment was the main concern. Unemployment was close to 14% in February 2005, with the natural rate of unemployment in Colombia considered to be around 10–12 %. This high level of structural unemployment was attributed to high non wage labor costs (referring again to the effects of C815/99), the relatively high minimum wage, labor market regulations, an excess supply of lower-skilled workers and the civil conflict that created many refugees. (C.R.05/1540:7). This was the last review of the second IMF arrangement (First Stand-by arrangement). The IMF recommended to continue with the staffing cuts in the public sector and the restructuring of public enterprises. The wage bill remained at 6.8 % of GDP because wages increased in line with expected inflation in 2005 and the workforce grew, mainly in the defense sector (C.R.05/1540:10). These circumstances were not mentioned in the constitutional processes presented in the Court. The wage bill was expected to remain stable in relation to GDP (C.R.05/1540:11). The budgetary pressures in the run up to the 2006 elections were mentioned as a risk (C.R.05/1540:18).

C.R. 05/162 analyzed the labor markets in Colombia. The IMF analyzed the sources of labor market rigidities and accused a relative high minimum legal wage of affecting employment and worsening income inequality. C815/99 intensified the economic distortions caused by the minimum wage level because it inhibited the adjustment of labor markets to the economic crisis (C.R.05/162 6-7; 12).

C.R. 05/392 highlighted that real GDP was expected to grow by almost 4% due to the strong real growth in investment and exports. The urban unemployment rate fell to 13.8 %, compared with 15 % in the previous year. The inflation rate was historically low, projected at 5 % for 2005 (C.R.05/392:5). Referring to the public enterprise reform, a large program of privatizations in the oil sector and in the sector of public utilities was presented. The majority stake in the state telecommunications company was sold (*Telecom*). The modernization of the Cartagena refinery was planned in the form of a joint venture, with *Ecopetrol* holding a share of up to 49 % by 2006 (structural benchmark). *Ecogas*, was planned to be sold by end-2005. An investment bank had to prepare several regional electricity firms to be sold by 2006 (C.R.05/392:18, 44).

C.R. 06/234 evaluated as highly positive the economic performance in 2005. Real GDP grew by over 5%, due to “a sharp rise in non-residential investment”. The inflation rate was 4.9%, below the target, “aided by low price increases of traded goods” (C.R.06/234:5). Urban unemployment fell to 12.2 % by end-2005, compared to about 16 % in 2000-2. The deficit of the central government (comprising the central administration, social security and decentralized agencies) fell to 2.6 % of GDP, better than expected, due to the growth and better “enforcement boosted tax revenues” and the restrained non interest spending (C.R.06/234:7). The staff appraisal recognized that the strategy was successful in strengthening fiscal policy and managing inflation and that it was helped by a favorable global economy (C.R. 06/234:25). The reform of public enterprises continued. In April 2006, Telefónica of Spain purchased a majority stake in *Telecom*. *Ecogas*, was expected to be sold in 2006 and *Ecopetrol* continued with its program of modernization of the Cartagena refinery (C.R. 06/234:20).

C.R. 06/401 omitted the periodical evaluation of the performance of the country with respect to the compliance with the benchmarks of the arrangement, but it analyzed specific topics. The FAD evaluated the fiscal risks of some public enterprises in the energy sector: ISA and ISAGEN, and in the oil sector, *Ecopetrol*. The IMF supported their commercial orientation and their exclusion from the national budget so that workers would belong to the private regime (C.R.06/401:8). *Ecopetrol* was particularly analyzed because it is the main public enterprise contributing to the national budget. As a way to protect it, the IMF proposed to enhance its commercial orientation and increase the independence of the board of directors (C.R.06/401:9-13). The progress in inflation of the last years was appreciated and the negative effect of case law on wage indexation for monetary policy was not mentioned.

C.R. 06/408 warned that although the economy continued to perform well, some signs of possible overheating appeared. In 2006, real GDP was expected to grow by about 5 % of GDP for the third consecutive year, and the economy was probably operating near capacity. The inflation rate was forecasted at 4,5%, the lowest in decades. The 2006 elections strengthened confidence (C.R. 06/408:4). However, the staff recommended the adoption of a more ambitious fiscal policy to stabilize public debt below 40 % of GDP, visualizing the risks to the global economic outlook (C.R.06/408:11-2). The Alternate Executive Director for Colombia remarked that the program was implemented in full, with all reviews undertaken in a timely manner. The Congress approved the 2007 budget, consistent with a CPS deficit of 1.7 % of GDP (C.R.06/408).

In general, the negative opinion of the IMF on Court rulings about wages was notorious, as well as its claim that those rulings were responsibly for some fiscal distortions in the program. The last years, once the economic stability was highlighted (i.e. since 2005), the distortionary role of the Court almost disappeared. However, in the analysis of labor markets, C815/99 continued to be shown as a clear obstruction to reduce unemployment. In the analysis of monetary policy and the control of inflation, those rulings appear again as a problem for reaching the targets. After 2005, when inflation dropped, the rulings of the Court were not longer mentioned. By contrast, rulings analyzing structural reforms seeking to downsize the state and to privatize were not mentioned because they were in line with the purposes of the IMF arrangements. Only one ruling previous to those arrangements and referring to a statute (Law 489/98), also enacted before, was quoted as a clearly bad intervention of the Court. However, this issue was not further analyzed.

6.4 Restructuring and downsizing of the State

The management of the structure of the state has been highly influenced by the guidelines of the World Bank (1997, 2002), oriented toward the privatization of the provision of goods and the implementation of the criteria of competitiveness and efficiency of the markets. The modernization (restructuring) of the state refers to the design of policies seeking to reduce the size of the state and the privatization of public services to bring them within the logic of the markets (Charry 2003: 25). Until the beginning of the 1990s, the World Bank had been very little involved in public administration issues. The World Bank had only started to address specific tasks and to strengthen single agencies. This limited role was related to its general position in favor of a reduced role of the state in the economy and also to earlier unfruitful

experiences with institutional strengthening in Africa (Chaudry 1994:199). But the World Bank started to rethink the role of the State and civil service reform in the early 1990s, which subsequently led to the publication of the 1997 World Development Report dedicated to this topic. In the Bank's view, the most serious symptoms of administrative dysfunction were: surplus employment, cost overruns and poor performance (Shihata 1994:11). Dysfunction was the result of external factors (growing supply of young job seekers, poor economic growth and therefore poor labor absorption capacity of the private sector, political expectations about the absorption capacity of the public sector) and internal factors related to personnel management (inappropriate recruitment, career development and wage policies).

The World Bank proposed a number of essential elements of a comprehensive reform process. It recommended the downscaling of the state, away from the day to day running of the economy (Shihata 1994:12). Public competences should better correspond to the capacity of the state, and should be centered on 5 fundamental tasks: i) the establishment of a basic judicial order; ii) the maintaining of a non-distortionary policy environment (including macroeconomic stability); iii) the investment in basic social services and infrastructure, iv) the protection of vulnerable groups, and v) the protection of the environment (Banco Mundial 1997:3-4). The complementarities between the market and the state were at the center of this design and they were taken up again in the 2002 World Development Report. Here, an institutionalist approach was followed as an effective way to reach efficient markets and an efficient state to construct the basis of economic development. The downscaling of the public sector logically implied a reduction of public employment. At the same time, the World Bank proposes a "revitalization" of the institutional capacity of the State, offering public employees incentives to perform better. This had to be achieved through effective norms and controls, more competition and citizen consultation and participation (Banco Mundial 1997:8). Competition had an internal and an external dimension; the internal referred to merit based engagement, merit based promotion and "sufficient" levels of remuneration. The external dimension referred to competitive public procurement, issue included in this study in the sector of transparency.³⁹⁴

In Colombia the P.C. of 1991 has been highly criticized because it increased the size of the state and the budgets appropriated for its functioning, due to the constitutionalization of a generous catalogue of rights (Charry 2003:23-5). The first restructuring was performed under the guidelines of the transitory article 20 of

³⁹⁴ This is the perspective identified with the EAL approach (see chapter 2)

the P.C. which liquidated 19 entities and restructured 43 (Charry 2003:26).³⁹⁵ This period is also known as the “first phase” of the modernization of the state (1992-4) that sought a better definition of the objectives of public organisms and a procedural simplification (Rojas 2003:958). Later, Law 344/97 (Law to rationalize public expenditures) tried to restructure the size of the state again, but notwithstanding, the creation of entities continued and reached close to 400 entities (Charry 2003: 26). The Court is seen as a promoter of a structure of the state which is adequate to reaching the goals of the Legal Social State (SU111/97 quoted by Charry 2003:26). This framework was the antecedent for the second phase starting in 1999 (after Law 489/98) which had as its main purpose the fiscal rationalization through the “streamlining and downsizing of the central government public sector”. The goals were again: spending reduction, fiscal sustainability and efficiency. Rulings of the Court that struck down the delegation of legislative competences realized by Law 489/98 were accused of obstructing this process (Rojas 2003:958, 967).

The case law of the Court on the restructuring of the state, particularly the rulings referring to the constitutional competences of the legislative and the executive to define public wages and their labor regimes, has been vast and not uniform. The following table was constructed on the basis of academic opinions on essential rulings, although not necessarily shared by all the authors, provided the numerous and non uniform precedents on the topic. The studies considered here were Charry (2003:27-34), Palacios (1999:169), Julio E. (2003) and Ospina and Sanchez (2003).³⁹⁶

Table 6.1 Constitutional Court case law referring to the restructuring of the state

Ruling	Law	Decision
C112/93	Law 60/93 ³⁹⁷	Distribution of competences between the legislative and executive to define public wages. The enactment of a frame law was necessary (150 (19 e,f), 189 (14) P.C). The Congress is competent to define the structure of the administration (150.7 P.C.) the objectives (150 (7) P.C.), the establishment of the expenditures of the administration (150 (11) P.C.) and its labor regime (210 P.C.). The establishment of limits to wage increases of official workers respected the right to negotiate collective bargains because the control of the expenditures is authorized by the P.C. (189 (14) and 364).
C465/92	Law 18/89 ³⁹⁸	It quoted case law produced under the CN of 1886, to define the scope of the competences: the law defines the static part of the structure of the state, and the government regulates the dynamic part of the structure of the State.
C074/93	D1755/91 ³⁹⁹	The structure of the state was analyzed vis-à-vis the economic structure and the

³⁹⁵ A broad analysis of the reform of the public administration and the state, including the decentralization process as a development of the new constitutional order, is developed by Rojas (2003).

³⁹⁶ Some of them referred also to the case law of the Council of State, analyzing the decrees that developed the statutory regulation; they were not analyzed because they are out of the scope of this research (Ospina and Sanchez 2003).

³⁹⁷ It developed the P.C. (356-7) on the distribution of competences and resources of intergovernmental transfers.

³⁹⁸ It established competences and specific functions in the Ministries, Administrative Departments and Superintendencies.

³⁹⁹ It restructured the Banco Agrario (Agrarian Bank).

		internationalization of the economy. The constitutional relevance of macroeconomic policies and its relation with the modernization of the state and the respect for constitutional labor rights was also analyzed.
C 089A/94	D1680/91 ⁴⁰⁰	The objectives and general competences were defined as the static part of the structure of the administration (150 (7) P.C.) that corresponds to the Congress; the President (189 (14-6) P.C.) should determine the competences of each of the dependencies of the entity.
C315/95	L 4/92 ⁴⁰¹	The competences to establish the wage regime of territorial entities and the possibility to establish limits to those wages was constitutional, except for official workers and members of public corporations elected by vote.
C262/95	L99/93 ⁴⁰²	The competences of the government to restructure a public entity include the possibility of modifying labor regimes.
C432/95	L1298/94 ⁴⁰³	The Law has an exclusive competence to determine the categories of public employees of specific entities.
C032/96	Law 188/95 ⁴⁰⁴	The Law of the National Development Plan may modify the structure of the state.
SU 111/97	APFR	The structure of the State must be designed to comply with the goals of the Legal Social State.
C209/97	Law 300/96 ⁴⁰⁵	A new precedent was defined: the restructuring of the state should be coherent with the P.C., i.e. the restructuring should seek the goals of the state (the provision of services, the warranty of constitutional rights). The restructuring may reform labor regime but respecting constitutional labor rights.
C312/97	L4/92	The president has the main responsibilities for wage policies, including workers of the General Prosecutor and the Public Ministry offices (150(19) and 189 (20) P.C.).
C 054/98	L100/93 (193) ⁴⁰⁶	The competences of the President to establish public wages include the territorial entities.
C140/98	Law 489/98 ⁴⁰⁷	It defined the difference between legislative competences (150 (7) P.C.) and governmental competences (189 (15, 16) P.C.) in restructuring, including labor issues (189 (14, 17) P.C.). The doctrine that those legislative competences cannot be delegated to the government (150 (10) P.C.) is based on the fact that they imply collaboration and control between the legislative and the executive.
C196/98	Bill 248/97 Senate 50/96 Chamber.	The creation of positions in the Congress is a legislative competence as well as the establishment of the wages and labor benefits of its employees.
C675/98	Law 35/93 ⁴⁰⁸	Scope of presidential competences in restructuring (189 (15,16 P.C.)
C561/99	Law 489/98	The scope of the concepts of decentralization, and de-concentration was defined and the competences for the President to de-concentrate or decentralize, particularly the competences of surveillance and control.
C 702/99	Law 489/98	It struck down article 51 because of its vagueness and imprecision. The key problem was to distinguish between a general concept and a vague concept (Charry 2003:33) This ruling was seen by the IMF as an obstruction to the structural adjustment goals.
C710/99	L4/92	The competence to define the annual public wage increase cannot be limited by the legislator in

⁴⁰⁰ Legislative decree that developed the competences delegated by Law 55/90. This ruling referred to the constitutional transition because it is a norm enacted before the enactment of the P.C./91 but whose constitutionality was analyzed under the P.C. /91. It "reorganized" the Administrative Department of the Presidency of the Republic.

⁴⁰¹ It defined the rules, objectives and criteria that the government should respect for the establishment of wages and labor benefits regimes of public employees, the employees of the Congress and the Military.

⁴⁰² It created the Ministry of the Environment and organized the National System of the Environment.

⁴⁰³ Organic Law of the Social Security System in Health; it developed the delegation of legislative competences of Law 100/93 (248 (5)).

⁴⁰⁴ National Development Plan and Investment Plan 1995-8.

⁴⁰⁵ General Statute of Tourism.

⁴⁰⁶ Organic Statute of the Social Security System. Incentives to health workers including workers of territorial entities.

⁴⁰⁷ It regulates the organization and functioning of national public entities and established guidelines for the execution of the presidential constitutional competences (189 (15-6) P.C).

⁴⁰⁸ The Financial Statute: It defines the objectives and criteria for the government to regulate the activities of the financial and insurance sectors, the stock exchange and whichever related to the management, utilization and investment of resources of citizens.

		a specific period of time ⁴⁰⁹ .
C953/99	Law 489/98	The share of public capital in mixed corporations does not define their legal regime.
C727/00	Law/98 (52)	The de-concentration and delegation of administrative competences involving public entities may be realized by the government (T024/96) but if, as a result, an organism loses all its competences only the law may eliminate the entity (150 (7) P.C.)
C1190/00	Law 432/98 ⁴¹⁰	The competences of the entities are not independent of their objectives, and in turn, these objectives cannot be independent from the goals of the state and from the principles of the public function (2, 209 P.C.).
C1437/00	L489/98	The delegation of the competence to define the integration of the administrative sector by the type of relation (link or attachment (<i>vinculación or adscripción</i>) is an exclusive legislative competence (150(7) P.C.) The concept "structure" includes a kind of legal and administrative relation among public entities. This ruling was accused of obstructing the staff cutting process (Clavijo 2001c).
C401/01	L573/00	Delegation of legislative competences to define the wage and social security regime of the General Prosecutor Office is unconstitutional because it should be realized by a frame law.
C579/01	L617/00	The establishment of limits to the salaries of comptrollers is constitutional.

From those rulings, it can be observed that the variability of precedents is high. However, a clear precedent is that in a process of restructuring, the labor regime of public employees can be reformed, but respecting constitutional labor rights. The core issue has been to define whether the delegation of legislative competences to restructure the state is constitutional. A clear precedent seems to be that the legislative competence to determine the structure of the administration (creation, objectives and functioning) cannot be delegated (150 (7) P.C.) and the President should develop the guidelines provided by the law (189 (15-6) P.C.). However, the level of specificity of those guidelines is still unclear. It is also clear that the regulation of the public wage regime should be developed by a Frame Law (150 (19 (e)) P.C.) and the President should determine it under those parameters. This legislative competence cannot be delegated. The relevance of those issues is that public expenditure in "personnel services" is an important share of national and territorial budgets. This appropriation depends on: 1) the creation or fusion of public entities (150 (7) and 189 (15,16) P.C.); 2) the creation or reform of the staff organization (189 (14) P.C.), realized under the legal parameters (administrative career); 3) the regime of public wages which should be regulated by a frame law (150 (19 e, f) P.C.); 4) the wage regime of territorial entities workers which correspond to their entities (300 (7) and 313 (6) P.C.) (Palacios 1999:168-74).

6.4.1 Case law on state restructuring and staff reductions related with IMF arrangements.

This item was not particularly criticized by the IMF because, although some rulings conditioning the constitutionality or declaring the partial unconstitutionality of Laws 573/00 and 790/02, they did not affect

⁴⁰⁹ Parts of the dicta of this ruling were taken as precedent in the sentences referring to the indexation of public wages.

⁴¹⁰ Restructuring of the National Saving Fund (Fondo Nacional del Ahorro).

the program of staff reduction. Even more, the Constitutional Court was conservative enough to accept the legal ways employed for those purposes. The IMF only referred to C702/99 as a potential obstruction to the restructuring of the state (CR01/68). This ruling referred to Law 489/98 enacted one year before the start of the IMF arrangements. The restructuring based on Law 790/02 was provisionally initiated after President Uribe took office and before its enactment. This law sought to replace the articles struck down by C 702/99; some bills were presented as part of Law 489/98 but eventually, it was presented and enacted as an independent law. The presentation of motivations referred to the needs of fiscal adjustment through the restructuring, basically to realize a staff reduction (Lizarazo 2004:225-7).

C702/99 struck down a legislative authorization to restructure the state based on the constitutional competences of the President (189 (15-6) P.C.) and the delegation of legislative competences to restructure the state (150 (10) P.C.). In the first case the unconstitutionality was based on arguments of vagueness of the law, because it did not define the parameters and principles that the President had to follow when restructuring the public sector. In the second case, the failures in the legislative process (failures accepted in the case of the referendum, when fiscal measures were included during the legislative process and did not undergo all the constitutional debates in the Congress) justified the ruling. C702/99 argued that for the restructuring of the State, the Congress (150 (7) P.C.) and the government (189 (15) P.C.) had complementary competences and therefore, the law should establish the general principles, the objectives and the limits of the competences of the President. As those criteria were not included in the law, articles 51 and 53-4 were struck down because the law was vague, imprecise and violated the P.C.(150 (7) and 189 (16)). Some dissenting votes criticized the lack of motivation and coherence of the ruling, because these competences were conceded in Law 489/98, which included enough guidelines for the development of the competences by the President.

In the framework of the IMF arrangements, some rulings were particularly important although they did not imply an important constraint for the restructuring process: First, C401/01, which decided a challenge against C573/00, rejected the delegation of legislative competences to reform the wage and social security regimes of public employees because this is a shared competence. The Congress (150 (19) P.C.) should enact a frame law to determine the guidelines for the President to reform these regimes. The delegation of legislative competences to define the regime of liquidation and dissolution of public entities and to simplify administrative procedures was also declared unconstitutional. However, the Court accepted the delegation

of legislative competences to the government to restructure supervisory organisms (the offices of the Comptroller General, the Public Ministry, the General Accountant (who belongs to the executive)), the Electoral Authority (the National Registrar of the Civil Status) and the General Prosecutor Office. The Court accepted the modification of the labor regime in restructuring processes, through the use of delegated legislative competences, following the line of precedents mentioned above. A dissenting vote quoted as precedent C262/95 that conditioned the delegation of legislative competences to restructure the public administration to the establishment of guidelines by the Congress to realize the constitutional rule of coordination among public powers. This orientation, given also by C702/99, was considered by the Court as non obligatory obiter dicta, rejecting the analysis of a potential usurpation of legislative competences, overruling a general precedent dating back to several years before.

Referring to Law 790/02, the Court conditioned the constitutionality of some articles, but the main competences on which the restructuring was based, were supported. C880/03 analyzed Law 790/02(19); it established a limit to the increase of labor expenditures and functioning expenditures in general until 2005: they could not increase annually, based on the inflation rate of the past year. This article was upheld by C880/03 because it had a “teleological connection” with the finality of the law: the guarantee of the financial sustainability of the nation as part of the modernization of the state. This ruling clarified that the reform of public labor regimes in the context of restructuring programs may be realized in three ways: i) directly by the Congress (150 (7) P.C.), ii) by delegation of legislative competences (150(10) P.C.), and iii) directly by the President under the guidelines of the “law of authorizations” (189 (15) P.C.). The reform of labor regimes in the process of restructuring was justified by the accomplishment of the principles of effectiveness, celerity and administrative economy (209 P.C.) and by the need to adapt the administrative organization of public powers to the accomplishment of the goals of the State. Referring to the staff reduction, the Court accepted it but distinguished between career employees and freely appointed employees. The argument was that the restructuring is based on public interest reasons. Concerning the challenge of lack of precision in the definition of the delegation of legislative competences, the Court qualified the challenge as inept because it did not present the reason of the violation of the P.C. and the simple accusation of vagueness was not enough to analyze the charge.

This ruling also conditioned the constitutionality of Law 790/02 (2): the competences to reform the labor regime of public employees in the restructuring process should respect the stability of labor rights, wages

and labor benefits. If it is proved that the labor conditions are negatively affected, the workers should be compensated (which is not a complete indemnification), to avoid an excessive sacrifice to conserve their jobs. Three dissenting votes argued that the P.C. (53) demanded the respect for acquired rights and therefore the restructuring process cannot modify the legal nature of the labor relation if the right to collective bargain and labor benefits are affected. The compensation is unconstitutional, because the labor relation cannot be affected. Another dissenting vote accused the conditioning of the rule of being an extra limitation of the Court competences because it usurped an exclusive competence of the legislative. This case law supporting the restructuring of the state overruled precedents of C262/95 and C702/99.

The delegation of legislative competences of Law 573/00 was practically not used to reform the executive branch. In turn, Law 790/02 accomplished the goals of the IMF arrangements. The structure of the law was not different from Law 489/98, but the Court changed its position, ignoring the precedents and declared the constitutionality of the use of the constitutional competences of the President and the delegation of legislative competences to restructure the state.

6.5 The discussion on (public) wage indexation

One way to control public expenditure is by controlling the public wage bill. In turn, this can be done by controlling the number of employees in the public sector and/or by controlling their remuneration. Concrete measures may include hiring freezes, control of wage indexation and/or more drastic measures if the effect of the former is not sufficient.⁴¹¹ However, the importance of wage indexation in the public sector is not limited to its effect on public finances. It is also related to the broader problématique of wage indexation and its potential inflationary impact. Indeed, public wage indexation is usually linked to wage indexation mechanisms in general, be it formally or informally. Wage indexation is accused of leading to higher inflation, as it reduces the cost of inflation (Fisher and Summers, 1989). However, empirical research is not completely conclusive (Heinemann, 2003). At the same time, higher inflation may lead to wage indexation mechanisms to be used more (e.g. Danziger 1984). In the context of Latin America, for example, hyperinflationary episodes in countries like Argentina, Brazil, Chile and Mexico in the 1980s were linked to wage indexation mechanisms (Banco de Occidente, 2008). And recent high inflation rates in Argentina since 2006 have also been related to adjustments of public pensions and minimum wages.

⁴¹¹ The system of public career advancement, for example, may well lead to wage increases even with hiring freezes (i.e. wage drift). See, for example, Pereira and Pereira (2006) on the Portuguese case.

Another criticism of public wage indexation has been the omission of weighing the marginal productivity of highly qualified workers with wages below the level of the private sector, due to the incentive of stability of the administrative career, particularly in adverse economical cycles. (Clavijo 2001c:50). This criticism has also been contested because one particularity of public wages is that its cost is not sensible to the economic activity. They are defined by law and decree and therefore, in most of the cases the productivity of public workers cannot be measured; as a result, higher wages seek to incentivize the best efforts, which are called efficiency wages (Roemer 2001 quoted by Martinez 2008:8). These observations do not apply to the management level (Martinez 2008: 16).

In Colombia, an important part of the discussion on wage indexation has been related to the indexation of the minimum wages, which is a very important economic variable; not only do around 35% of all wage earners in the formal sector receive the minimum wage or similar, but other variables are also expressed in terms of the minimum wage, including: the unemployment subsidy, and several fines in the public sector (Arango, Herrera and Posada, 2007:14, 17-8). The criticism has been mainly based on the economic theory that wage indexation negatively affects employment, mainly of young people and obstructs monetary policy on inflation⁴¹² (Amaya 2001:88-9, 95, 99).

There is currently no automatic indexation mechanism for the minimum wage. A Permanent Commission for the Negotiation of Labor and Wage Policies should propose the minimum wage at the end of each year. This is a tri-partite body with equal representation of the government, employees and trade unions⁴¹³. If no consensus can be reached, following the established procedures, the government will determine the minimum wage before the end of the year, using the same criteria. However, C815/99 ruled that effective (real) inflation (as measured by the consumer price index) of the current year, (i.e. past inflation) should be

⁴¹² The relation between wage indexation and monetary policy is not further developed here. An IMF staff paper analyzed the theoretical relation between inflation and real wages and concluded that in inflationist periods real wages decrease and rejects the reason that is due to an incomplete indexation. The reasons of this situation were attributed to: 1) inflation “reduces the capital stock and reduces the productivity of labor”; 2) inflation “causes relative prices to shift against the labor-intensive good”. It concluded that the reduction of real wages is linked to an increase in poverty in Latin America in the last two decades; the peak of inflation coincided with the peak of poverty and it may explain why inequity is higher in Latin America than in Asia. It concluded that inflation control is the best way to reduce poverty (Braumann 2004: 143-5).

⁴¹³ Law 278 of 1996: “[...] the Commission should determine the minimum wage in a concerted way, taking into account the inflation target for the next year as determined by the Board of the Central Bank, productivity levels as agreed by the tri-partite productivity committee coordinated by the Ministry of Social Protection, the contribution of wages to national income, the growth of GDP and the index of consumer prices”.

added as a criterion to fix the minimum wage⁴¹⁴. The Colombian system is thus characterized by an annual revision without an automatic indexation based on price levels. This is in line with practices in many countries worldwide (table 6.2).

Table 6.2: Frequency of revision of minimum wages, and existence of wage indexation mechanisms according to the Law in selected countries.

	Revision every 6 months	Revision min. every year	Revision min. every 2 years	Revision min. every 3 years	Frequency of revision not specified
Automatic wage indexation mechanism (based on price index)			Belgium		Haiti, Luxemburg,
No automatic wage indexation mechanism	Spain, The Netherlands, Nicaragua	Australia, Colombia , Costa Rica, South Korea, Ecuador, France, Guatemala, Greece, Honduras, Mexico, New Zealand, Portugal, Czech Republic, Venezuela	Panama, Paraguay, Dominican Republic, Turkey	Brazil, El Salvador	Argentina, Bolivia, Canada, Chile, US, Hungary, Japan, Peru, UK, Uruguay

Note: The coverage of the minimum wage is different from one country to another.

Source: Arango, Herrera and Posada (2007), based on ILO data.

A review of the literature realized by Arango, Herrera and Posada (2007) analyzed the effects of the minimum wage on a series of economic variables in Colombia (employment, poverty, income distribution, and the importance of the informal economy) (table 6.3). In general they found that the results were 'mixed' and therefore not very conclusive (Arango, Herrera and Posada, 2007:2).⁴¹⁵

Table 6.3: Empirical evidence on effects of minimum wages in Colombia

	Positive effect on:	Negative effect on:	No effect on:
Lora and Herrera (1993)	Unskilled unemployment, share of informal employment		
Bell (1997)	Unemployment		
Núñez and Bonilla (2001)		Employment (especially for low wages)	
Hernández and Lasso (2003)	Youth employment	Adult employment	Labor demand
Arango and Pachón (2004)		Probability of employment, income distribution	
Hernández and Pinzón (2006)	Probability of youth employment		
Arango and Posada (2006)			Remuneration in public sector, real wages in private sector

Source: Arango, Herrera and Posada (2007:1-3).

⁴¹⁴ As Arango, Herrera and Posada (2007:38) observed, this was done without any type of economic analysis.

⁴¹⁵ This seems to be consistent with international evidence, see for example, Neumark and Wascher (2006).

The World Bank, however, singled out binding minimum wages as a contributing factor to the excessively rigid character of the Colombian labor market, leading to relatively high unemployment levels (Fretes et al. 2003:755), an opinion which was reinforced by the IMF in the periodical evaluations (as presented in the previous section).⁴¹⁶ The World Bank recommended to make the Colombian labor market more flexible, the minimum wage system more simple and to minimize anti-employment effects ⁴¹⁷(Fretes et al. 2003:759-60). This critique of the World Bank on the minimum wage mechanism was not specific for the public sector. With respect to the public sector, the Bank further pointed to the activities of public sector trade unions, very much concerned with fixing wages, and proposed to reduce their influence on compensation and related matters (Fretes et al. 2003:761).

The hypothesis of economists “that minimum legal wage legislation and labor standards more generally” interfere with the market and produce unemployment among “the less skilled” was contested by some studies done in the US and in the UK showing an opposite effect: employment rose after the enactment of minimum wage statutes (Card and Kreuge 1995 quoted by Deakin and Wilkinson 1999: 561) and fell after they were eliminated (Dickens et Al. 1993 quoted by Deakin and Wilkinson 1999: 561). This shows how empirical work tested and contested economic theory, which is thus not able to offer absolute guidelines. This study concluded that the consequences of establishing or increasing minimum legal wages are “highly complex” and ethical issues are also involved in social policy (Deakin and Wilkinson 1999: 569).

6.5.1 A general characterization of public employment in Colombia

A brief summary of public employment in Colombia is presented to visualize the size of the issue. Since 1991 public employment has been diminishing from 11% of total employment in the middle of the eighties to less than 6% in 2005⁴¹⁸ (Martinez 2008: 2). This share is lower than in other Latin American and developed countries (World Bank 2005, quoted by Martinez 2008:2). Another characteristic of the public sector is the progressive increase in the last years of the share of professional workers, being close to 50% in 2005, compared to 20% in 1984 (Martinez 2008:4). The average age also changed; whereas in 1984 most public employees were in the range 25-44, in 2005 the majority was in the range 35-54.

⁴¹⁶ See also, Maloney and Nunez (2001).

⁴¹⁷ The proposed revision included: i) the reduction of the number of parameters for its establishment; ii) a move towards a non-binding minimum wage policy; iii) the avoidance of differential minimum wages; iv) the minimization of the role of the minimum wage as a reference for other variables; v) the introduction of two-yearly (instead of yearly) wage negotiations; vi) the broadening of the role of the Permanent Commission.

⁴¹⁸ The data were taken from a household survey, and Arango and Posada (2006:10) showed similar figures.

Services represented the major activity in the public sector, passing from 71% in 1984 to 89% in 2005. The number of employees in financial services, energy and transport dropped due to the policies of privatization of public utilities. Public wages were also higher than in the private sector, and the gap widened between 1984 and 2005 (Martínez 2008:6). However, the comparison and analysis of the level of public wages is complex because the decrees on the annual indexation cover exclusively the basic wage but the different hierarchies or levels⁴¹⁹ (and inside each level the grades) are not explicitly taken into account. Other elements to be considered to calculate the level of public wages are the representation expenses, and the different premiums attached to the post and not to the person. They therefore do not reflect the productivity (Arango and Posada 2006:4). Other benefits that should also be considered are the meals bonus and certain services and leisure which are not received by all the workers. When only the decrees are observed, a deterioration of public wages is notorious compared to inflation rates, but when all the mentioned factors are included, the tendency is the contrary since 1992, and similar to the tendency registered by the real wages of the private sector (Arango and Posada 2006:22). This study concluded that the main mechanism to increase public salaries is promotion (increasing the employment level) which is not counted as a wage increase (Arango and Posada 2006:23). This means that the policy privileges particular or grouped incentives and not a generalized recognition of indexation. Real minimum wages do not show a clear long term relation with real public or private wages (Arango and Posada 2006:4).

Another issue related to the annual public wage adjustment suggests that the annual indexation is not the problem because real wages of public employees were 4.6% lower in 2001 than in 1991. However, the phenomenon of the “wage leveling” has changed these figures and increased public wages by 28.1% in the decade. The gap between this increase and the inflation rate has been growing since 1996, which contrast with the public policy that from that year onwards adopted measures of austerity. Workers that benefited from this “leveling” were the Congressmen, the justices of high courts, the Public Ministry, the general Prosecutor, the Ombudsman, the Registrar, the ministries and the high military (Perez and Cordoba 2003:118-9). The general increases ordered by Law 4/92 were included in the certification of the Comptroller and therefore the average increase favored the annual increase of Congressmen. Other sectors also benefited, such as the educational staff which increased its real wages by 17% from 1995-2000 (Clavijo 2001c, quoted by Perez and Cordoba 2003: 118-9); health workers also increased their real

⁴¹⁹ They are advisers, executive, professional, technical and assistants (before administrative and operative personnel) and the grades go from 1 to 28. (Arango and Posada 2006:4).

wages faster than the inflation rate, but they are part of the SGP instead of the national budget.⁴²⁰ The guideline that higher wages increase productivity and competitiveness and reduce corruption is thus not demonstrated in practice (Perez and Cordoba 2003:119-20). The “wage leveling” has a political motivation which is not necessarily the realization of the Legal Social State; together with the military expenditure, they pushed the budgetary deficit more than wage indexation (Perez and Cordoba 2003: 126).

Constitutional case law on public wage indexation, demonstrated that other variables affect the budgetary item of personnel services⁴²¹: the constitutional and legal regulation of wages of Congressmen and other high employees of the state. The salary of Congressmen was first regulated by the Legislative Act 1/83 of the C.N./1886. The P.C./91 (187) established that their wages will increase annually, based on the weighted average of public wages certified by the General Comptroller. But also Law 4/92 (8) and Decree 801/92 defined that wages of congressmen are made up of a base salary (36%), representation expenses (64%), premiums of localization, housing and health (10%),⁴²² and Christmas premium not defined by law. A series of additional premiums for services and transport has been conceded to congressmen and all of them are included as wage factor for payment purposes (Jaramillo 2004:14-7).

Law 644/01 reformed Law 42/93 (48) which regulated the certification of the General Comptroller to determine the annual wage adjustment of Congressmen, because the interpretation of the General Comptroller was producing consequences that went against the goal of the rule, including the wage increase obtained by collective bargains. This law ordered to consider only wages of the central administration of the national level, excluding decentralized entities and increases realized under collective bargains and added that they cannot exceed the proportion of adjustment of the corresponding scale in the central administration⁴²³ (Jaramillo 2004:20-1). However, the basis for the calculation of wages continues to be the same, including premiums and representation expenses. The fiscal impact is non negligible because Law 4/92 (15) established that the justices of high courts, the Public Ministry, the General Comptroller, the General Prosecutor, the Ombudsman and the National Registrar receive a special premium of services that

⁴²⁰ Paradoxically, the levelling produced a generalized staff increase of the same sectors, making the restructuring process a fallacy because the “parallel payroll and civil contracts of services” replace the staff cuts (Perez and Cordoba 2003:119-20).

⁴²¹ Personnel expenditures of the national budget were on average 3.1 % of GDP in 1997- 2001 (Contraloría 2000:130).

⁴²² The representation expenses and the premiums were included in Law 4/92 (2) to be granted only when the circumstances justified it but not in a permanent way. C608/99 upholds the rule because it was only a guideline but not an automatic recognition.

⁴²³ C247/02 declared a partial unconstitutionality because the law exceeded the text of the P.C. The Senate added that the purpose of this rule was “to avoid the perverse effects and to harm feelings of equity, justice and equality” (Jaramillo 2004:20-1).

together with their basic wages, will be equivalent to the wages of Congressmen. The law authorized the government to give this premium to the Ministries, the Army and the Police. The law established that this premium should not be considered as salary (and as a result, the calculation of pensions, labor benefits and adjustment should not include it) but the Court struck down this point in C681/03. Despite that the Ministry of Finance opposed the challenge, the Public Ministry and the Court (composed by alternate justices) supported the challenge and struck down the expression that they are not part of the salary, based on the violation of the ILO Convention 100 (3), and the principles of equality (123, 13 and 53 P.C.). This ruling was decided the same year when they were limiting public wages because of the fiscal constraint, and it rejected arguments against the high levels of adjustment of the wages of high employees because they were not challenged and because they were “constitutional regulations”.

Table 6.4 Comparison of wage increases

Year	Inflation Rate	Private sector minimum wages adjustment	Public Sector wage adjustment	Congressmen wage adjustment
1993	22.61	25.03	25	26.80
1994	22.60	21.08	21	26.80
1995	19.47	20.50	18.30	21.00
1996	21.64	19.50	17.20	21.50
1997	17.68	21.02	13.50 weighted	24.69
1998	16.70	18.05	16 (id)	17.62
1999	9.23	16	15 (id)	18.90
2000	8.75	10	9.23	15.30 ⁴²⁴
2001	7.65	9.95	6.50 (id)	4.41
2002		8.04	5.20 (id)	5.62

Source: Jaramillo (2004:19)

A calculation shows that the total value of these wage increases represented an amount of 3.710 million COP (Jaramillo 2004:23). This represents an additional pressure on the national budget, absolutely ignored by the Court and the economic regulators of public wage indexation.

6.5.2 The Constitutional Court and public wage indexation

The intervention of the Court through its rulings, analyzing legal minimum wages and public wage indexation, has been the focus of severe criticisms from an economic perspective. The Court is accused of ignoring the high public deficit and the excessive number of public workers with low productivity (Clavijo

⁴²⁴ This increase covered also justices of higher courts and other high officers of the State. The differences are even bigger if the adjustment base covers also some premiums and representation expenses (Jaramillo 2004:19-20).

2001c 50).⁴²⁵ The Court, primarily through its APFR rulings, has been systematically protecting labor rights and more concretely wages (SU995/99). The ILO conventions are considered as compulsory because the P.C. (53) established that international labor conventions ratified by Colombia are part of the national legislation. As a result, wages are seen as fundamental rights because it is the direct retribution of delivered services and because it allows realizing other fundamental rights as subsistence, health and education. Case law that protects wages is based on the P.C. (53) which established its “minimum, vital and mobile character”. The scope of those terms is still a source of discussion even inside the Court, and some academic works have been trying to give them a specific scope. “Minimum” signifies that under a specific limit, workers and employers cannot agree on a labor content; “vital” means that wages should warrant the satisfaction of basic needs to get a dignified life and the “mobile” character seeks to maintain the purchasing power of wages (Alvarez 2002:150-1). Constitutional case law has been protecting wages in periods of economic crises, ruling that the lack of solvency of employers does not justify the non compliance of labor duties (T446/01 quoted by Alvarez 2002:150-1). These rulings were criticized by the IMF which nuanced this right to support fiscal adjustments. The Court argued that the valuation of the minimum wages according to the P.C. (53) is qualitative and not quantitative, because the “minimum dignified conditions of life do not refer to the subsistence minimum but they depend on the particular conditions of each worker” (T439 /00 and SU995/99 quoted by Alvarez 2002:152)⁴²⁶. As a result, the vital minimum character of wages is not the same as the minimum legal wage, but rather the minimum income that any person needs to sustain a minimum standard through his/her work (Alvarez 2002:156). Wage mobility, is a way to protect labor relations in a Legal Social State because wages are not a financial debt but a purchasing value which should be legally protected. If the annual indexation is not applied, the employer is receiving an “unjustified enrichment” which violates a just order (Preamble and 2 of the P.C.); as a result, the state should intervene in the economy to warrant the effective access to goods and basic services, particularly by the most vulnerable groups (334 P.C.). Wage mobility corresponds to this group but also it is a typical characteristic of a synallagmatic labor contract (T102/95 quoted by Alvarez 2002:159-60). From the P.C. (53) and the case law on the vital minimum the Court has derived the right to wage indexation, first by APFR (SU 519/97, T296/97 quoted by Julio 2003:152) and then by judicial review.

⁴²⁵The Court has also been accused of perturbing the staff cutting process (presented as an alternative to productivity increases). C1437/00 (Table 6.1) was presented as an example of this obstruction (Clavijo 2001c 50), but the relevant ruling accused of obstructing state restructuring was C 702/99.

⁴²⁶ He quoted also APFR rulings supporting this orientation: T394/01, T312/01; T595/01; T845/01; T394/01; T486/01.

However, in the case of public wages in the period 2000-6, the use of the APFR has been systematically rejected when an indexation was asked by this way.

Economic criticisms of constitutional case law referred also to the regulation of labor markets, because wage increases by legal order may increase unemployment (Fajardo and Guataqui 2000, quoted by Pérez 2003:80). However, those criticisms have not always been an example of clarity because they reject Court rulings based on “international criteria” that are also controversial. The economic critics have not reached a clear consensus about the economically correct formula of wage increases (Pérez 2003:80-1). Although the expected budgetary consequences of Court rulings were seen as catastrophic (more indebtedness, cutting in investment programs and social expenditure), the freezing of public wages⁴²⁷ was not as crucial for the accomplishment of the fiscal goals of the adjustment as the monetary policy of the Central Bank, reaching an inflation rate one point below the one forecasted for 2000. Some members of the Board of Directors of the Central Bank criticized the ruling because of its potential distortionary effect on the control of inflation. However, a positive macroeconomic effect of the ruling was recognized: the payment of the indexation at the end of the year increased the demand and would help the economic reactivation and would produce a higher income for the state. The Comptroller concluded that the budgetary cost of the ruling (C1433/00) was not as negative as the government predicted but instead it showed a lack of foresight by the government (Contraloría 2000:130).

Before analyzing in detail the rulings deciding statutes that limited public wage indexation as a way to control the fiscal deficit in the framework of the IMF arrangements, two older rulings, outside the considered period, are relevant because they were quoted as precedent of the rulings analyzing the annual budget laws during the IMF programs, but also because one of them received most of the criticisms from the IMF, the World Bank and economists and several doubts were expressed about the institutional capacity of the Court to understand economic variables (Hofstetter 2006, Clavijo 2001c, Jaramillo and Ossa 2001). First, C710/99 solved a challenge against Law 4/92 (4) because it limited the competence of the government to enact the decrees of public wage increases to the first ten days of the year. The Court declared the unconstitutionality because the government cannot lose the competence to determine wage increases (136 (2) P.C.). It is referred to because it argued in the dicta that the protection of wages against inflation is constitutional.

⁴²⁷ This commentary refers to 547/99 and C1433/00.

Second, C815/99 analyzed Law 278/96 (8), referring to the unilateral definition of the minimum wage by the government once the negotiation mechanism has failed. The Court ruled that the government should follow the legal criteria but added that wage increases cannot be inferior to the inflation rate of the previous year to accomplish the constitutional duty to conserve the purchasing power of wages. The Court assimilated the mobile character of wages (53 P.C.) with the right to annual wage indexation, otherwise it would be an unjust enrichment for the employer who receives the same work for a lower price; this argument was taken from a previous APFR ruling (T276/97). The Court concluded that the P.C. (53) obliged a complete indexation. The Court clarified that this ruling should be analyzed and applied together with C 481/99 which declared the partial unconstitutionality and the conditioned constitutionality of Law 31/92⁴²⁸ (2). This ruling established that the accomplishment of the monetary, exchange and credit policies by the Central Bank are subject to the constitutional principles and the effectiveness of the Legal Social State, which include the progressive application of ESC rights. The Central Bank is not totally independent nor has as its exclusive mandate the control of the inflation. The Central Bank cannot ignore other objectives of economic policy and should obey the law (371-3, 113 and 150 (13, 19, 22) of the P.C.), collaborate in the realization of the values of the Legal Social State (1 and 2 P.C.), materialize the intervention of the state in the economy (334 P.C.) and concretely, seek full employment and an equitable distribution of the benefits of development. As a result, the Court conditioned the constitutionality of Law 278/96(8), asking the government to consider all relevant factors (included in the challenged rule), but especially to take into account the past inflation rate (25, 53 and 333-4 P.C.) to protect the whole population, but particularly the more vulnerable groups.

One dissenting vote criticized the ruling because it pretended to extend its effects to an eventual application of the rule which is not the competence of the Court but belongs to the Administrative jurisdiction which analyzes the governmental decrees and which should analyze the compliance with the P.C. and the law. As to the Public Ministry, it recognized that the inflation rate of the past year is the only factor that reflects the capacity to satisfy the minimum vital conditions, and therefore the adjustment cannot be below this indicator. Two other dissenting votes rejected the conditioned ruling because it simply integrated the text of

⁴²⁸ This law established the general guidelines for the functioning of the Central Bank and for the governmental competences related to the monetary, exchange and credit policies. It is a Frame law enacted under the legislative competences (150 (19) P.C.) and according to the constitutional regulation of the Central Bank (372 P.C.). The challenged rule established as a goal of the Central Bank, the protection of the purchasing power of the money. The Court struck down the rule indicating that the inflation targets should always be inferior to the last registered results.

the challenged rule in the resolute part of the ruling, adding constitutional rules, which is a redundant legal act because those rules are obligatory *per se*. The prohibition to adjust the minimum wage below past inflation is not a constitutional sub-rule resulting from a simple deduction or from the quotation of a general constitutional expression; it should be the result of a real constitutional interpretation. This showed the lack of effort to apprehend the needed knowledge of issues submitted to constitutional analysis. Constitutional interpretation cannot be a simple exercise of rhetoric and judges would continue “surfing in empty words” that do not correspond to the P.C.

Some economic analyses considered that C 815/99 affected monetary policy (i.e. the control of inflation) because the proposed formula of indexation makes the disinflation process slower and the inflation more persistent (Hofstetter 2006:107). Another study (Clavijo 2001c 53-5) affirmed that it is a “universal principle” that wages should be adjusted according to “the evolution of the inflation and the productivity” to respect the principle of equity. They used, as the Court did, “universal economic principles” to criticize the ruling, but as it was mentioned before, these are not really principles and they are not universal; on the contrary, they are highly debated economic criteria. C815/99 was judged as one of the most controversial rulings, increasing substantially public expenditures and being a “clear case of fiscal irresponsibility”, although highly defended by the workers. The Court was even accused of a sort of “judicial populism” which “may eventually generate a negative welfare impact on the population and erode the Court’s credibility and standing” (Saez 2003:901-2).

6.5.2.1 APFR case law on wage indexation.

Despite the protection promoted by the Constitutional Court over the past years, a screening of the APFR case law concerning the annual indexation of public wages shows that in the analyzed period, the Court did not always rule in the same way. The contrast between the legal reasoning performed by the Court in the APFR vis-à-vis the judicial review case law on wage indexation is notorious, and even more compared to the APFR case law referring to the right to health. Although in the judicial review case law the Court recognized and protected the ESC right to annual wage indexation, APFR case law rulings on petitions to obtain the protection of this right were unanimously rejected. In 2000, 15 APFR rulings of the Court rejected the protection of this right because the APFR cannot modify wage policies. What is surprising is that in this case law the autonomy of the government to determine wage policy is recognized, but not in the judicial review case law.

The most important ruling is SU1052/00⁴²⁹, defined as precedent and a parameter for the use of the APFR to demand wage increases (indexation). This ruling highlighted that the APFR is subsidiary, and therefore it cannot be used when other legal actions are established as a mechanism for the protection of the invoked right. Even more, the Court affirmed that it cannot intervene in abstract decisions whose competence belongs to other branches of power (the legislative or the government) because it cannot substitute the state in the formulation and application of fiscal policy. This argument is openly contrary to the legal reasoning presented in APFR case law referring to the right to health.

The Court also affirmed that it is not lawful to try to influence wage policies with the purpose of protecting constitutional rights, because it is not within its constitutional competence to use APFR rulings to decide on all public issues including the general direction of the economy; this would be an extra limitation of its own competences and it would be unconstitutional and not pertinent because the principle of separation of powers would be violated (P.C. (6 and 113)). The Court supported the arguments of the Ministry of Finance in this process (SU1052/00) defending the non indexation of wages higher than two minimum wages because it would not respect the rule of law of the Organic Budget Law (OBL (39)) and the P.C. The reason was that the inclusion of expenditures in the annual budget law without the respective available resources is forbidden. The Court highlighted its lack of competence to order wage indexation via the APFR (P.C. (6, 86, 345-7) and OBL (71)), and that it could even run into peculation (Criminal Code (136)) when compromising additional resources to those approved in the annual budget law or when ordering the investment of budgetary resources in a way other than the one established in the budget. The argument of violation of the equality principle (13 P.C.) because of the annual increase for Congressmen (187 P.C.) and higher employees of the state (Law 4/92 (15)) which included justices of high courts, was rejected because the APFR was not the way to challenge those rules. Notwithstanding, the Court concluded that the general effect of the non indexation of public wages cannot be ignored and recommended the government, circumstances permitting, to increase wages following the P.C. and the constitutional case law (C815/99).

The APFR presented and revised by the Court correspond to the years 2000 and 2001, just the years when the Court recognized the total indexation of public wages and ordered the government to appropriate the

⁴²⁹ Although SU adjudication corresponds to the modification of a precedent, in cases of public wages SU adjudications were sentences of the plenary court (Sala Plena) because of the accumulation of a considerable number of processes.

amount necessary to pay them. After those years, the subject was not analyzed in the Constitutional Court APFR case law anymore.

Table 6.5 APFR case law on wage indexation

Sentence	decision	Reason
2000		
T655/00	Rejected	Lack of applicability of the APFR to wage increases
SU1052/00	Rejected	Lack of applicability of the APFR to wage increases because it is not possible to reform the wage policy of the government this way
SU1113/00 ⁴³⁰	Rejected	SU1052/00
SU1148/00	Rejected	SU1052/00
T1257/00	Rejected	SU1052/00
SU1194/00	Rejected	SU1052/00
T1353/00	Rejected	SU1052/00
SU1382/00	Rejected	SU1052/00
T1431/00	Rejected	SU1052/00
T1501/00	Rejected	SU1052/00
T1525/00	Rejected	SU1052/00
T1564/00	Rejected	SU1052/00
T1638/00	Rejected	SU1052/00
T1667/00	Rejected	SU1052/00
T1731/00	Rejected	SU1052/00
2001		
T031/01	Rejected	SU1052/00
T179/01	Rejected	SU1052/00
T211/01	Rejected	SU1052/00
T228/01	Rejected	SU1052/00
T293/01	Rejected	SU1052/00
T296/01	Rejected	SU1052/00
T313/01	Rejected	SU1052/00
T336/01	Rejected	SU1052/00
T377/01	Rejected	SU1052/00
T385/01	Rejected	SU1052/00
T439/01	Rejected	SU1052/00
T447/01	Rejected	SU1052/00
T453/01	Rejected	SU1052/00
T605/01	Rejected	SU1052/00
T643/01	Rejected	SU1052/00
T683/01	Rejected	The Hospital did not demonstrate the vital minimum ⁴³¹
T770/01	Rejected	The APFR is not lawful to demand wage increase ⁴³²

Source: www.ramajudicial.gov.co

⁴³⁰ This ruling adopted the precedent of SU1052/00 but recommended the government to enact decrees from the first day of the year to assure that all public employees keep the purchasing power of their wages.

⁴³¹ It sought the payment of a credit based on C1433/00 that ordered the generalized wage indexation to the public sector; the APFR was rejected because there were other ways to recover the debt and it did not affect the vital minimum.

⁴³² This ruling is posterior to C1433/00 and reiterated the doctrine of the impossibility of using the APFR action to ask wage increases, even in situations when the employer did not comply with this ruling, because they should use ordinary actions to seek the protection of the right by the Court (C1433/00). The discrimination was alleged vis-à-vis other public entities that ordered the indexation after the sentence, but the Court rejected the argument because the discrimination may be invoked when one employer denied the indexation to some workers and conceded it to others.

Those rulings have as characteristic that they were the accumulation of a considerable number of APFR, in which it was also characteristic that judges of lower levels mostly concede the APFR to demand wage indexation, contrary to the Court case law. From 2001 onwards no more APFR concerning public wage indexation were found in the case law of the Court. The explanation may be the lack of challenges, or, that the Court did not select more of these cases for revision provided the clear precedents rejecting its protection by the way of the APFR

6.5.2.2 Analysis of the more controversial judicial review case law

In the period 2000-06 four annual budget laws were challenged arguing the violation of the P.C by the government and the Congress because the budget did not include the necessary appropriations to indexate all public wages. The constitutional interpretation used in these rulings shows a notorious use of conditioned sentences ordering the government and the Congress additional budgetary appropriations. However, this case law mostly supported public policies and also shows a considerable degree of variation and little respect for precedents. Ruling C551/03 studied the constitutionality of the referendum enacted to reform the P.C. It was considered here because it sought to reform the P.C. in areas related to public wage adjustment and because the referendum was one of the core policy instruments seeking to implement the structural adjustment.

Table 6.6 Public wage indexation case law.

Law	Sentence	Constitutional adjudication	Unconstitutional adjudication	Conditioned rulings	Voting process
547/99	C1433/00		Art 2	Order to regulating authorities	2 DV
628/00	C1064/01			Art 2	4 DV 1 CV
780/02	C1017/03			Art. 2	3 DV
796/03	C551/03	Art 1 and 2	Art 1 p		2 DV
848/03	C931/04			Art 2	1 CV

▪ Ruling C1433/00

The challenge against Law 547/99 argued a legislative omission in the Annual Budget Law because it omitted the inclusion of the necessary appropriations to cover the total indexation of public wages. The first justice report rejected the challenge because the Court lacked the competence to rule on absolute legislative omissions. However, the reporter justice was substituted and the Court accepted the challenge because it violated the preamble and some general principles and rights (see *infra*). The source of unconstitutionality is found in the legislative intention deduced from the presentation of the bill by the

government to the Congress, which violated the P.C. (13, 53). Wage flexibility (mobility) is assimilated with wage indexation and therefore the ICESCR, the ICCPR and the American Convention of Human Rights and the P.C. (93) were violated.

The Ministry of Finance defended the constitutionality of the law. The challenge refers to objectives and criteria of wage policy which were not included in the annual budget law because it has an instrumental character which impedes the inclusion of non-budgetary measures as wage adjustment. The Public Ministry demanded the normative integration with Law 4/92. Based on past case law (C815/99) he argued that the non-appropriation of sufficient resources to index ate wages violated the P.C. (13, 53), because it is an ESC right protected even in exceptional situations as economic emergency (215 P.C.) and, therefore, the constitutionality should be conditioned.

The Court defended the protection of wage indexation and therefore, the annual budget law should appropriate enough resources to comply with this duty. The violation of the PC was deduced from the document in which the government presented the bill to the Congress and the exposition of motivations in the legislative process. The labor right to assure the “vital minimum” (SU995/99) and the equivalence between wages and work (T102/95, T276/97) is justified also in judicial review case law (C710/99 and C815/99). In addition, the obligatory character of public wage indexation is established in the P.C. (Preamble and articles 1, 2, 13, 48, 53, 187, 215, 334, 336). The Court argued that Law 4/92 included also the right to wage indexation and concluded that Law 547/99 discriminated on the basis of a macroeconomic criterion: the workers’ sacrifice contributes to the improvement of public finances. It qualified this criterion as not reasonable and violating of the principle of equality because inflation affects all workers. Wage indexation is not discretionary because the P.C. (53, 150 (19e)), Law 4/92 and precedents impose some obligatory criteria: the right to work in conditions of dignity and justice and the right to a minimum and flexible salary (“minimum, vital and mobile”).

One dissenting vote presented three arguments against the ruling: i) flexible (“mobile”) wages are an undetermined legal concept and therefore, different constitutional interpretations are possible. The dissenting opinion of C815/99 was the basis of this dissenting opinion, contradicting the argument that the P.C. establishes the right to wage indexation because the control of inflation is one of the goals and one of the functions of the state (334 P.C.) and a wage freeze is an effective measure to protect the general

constitutional interest. It was not a disproportional measure because the subsistence minimum is respected as well as the legislative competences. ii) The frame law (Law 4/92) obliges the government but not the Congress. iii) The annual budget law only defined the total amount of the national budget without indicating its distribution because public wages were determined by other rules (D182/00) and therefore the Court lacked the competence to decide this issue. Other dissenting votes argued that: i) the constitutional control cannot be realized on non-legal acts such as legislative omissions. ii) The Court did not interpret the P.C. systematically because the non compliance of a constitutional duty cannot be demonstrated by a “vague and wide” argument. iii) The judicial review has used “orders” in excess, usurping potentially competences of other public powers (113 P.C.).

An analysis of C1433/00 concluded that a wage freeze up to two minimum wages does not have meaningful effects on equity among public employees but it affects the equity in the society as a whole and mainly the most vulnerable groups. It is not efficient for the society (from a Pareto perspective) and from a budgetary point of view because resources allocated for investment would be used for wage indexation, affecting the productivity of the country. The government omitted this argumentation and instead presented the theoretical fiscal consequences of the ruling (Jaramillo and Ossa 2001:28).

Another study considered that C1433/00 overruled C377/98 which recognized the exclusive competence of the Congress and the executive for wage policy as C1504/00 (on staff cutting) did.⁴³³ C1549/00 was mentioned as a good ruling by some observers because it did not extend the doctrine of the right to wage indexation to the private sector. However, the Court did not rule on the contents of the petition, but it declared itself as inhibited to rule because the relative legislative omission was not present provided that the challenged rules did not refer to the wage increase. The comparison between the wages regimes in the public and the private sector created a situation of an absolute legislative omission and therefore the Court lacked the competence to rule on it (C1549/00 quoted by Clavijo 2001c 55).

- **Ruling C1064/01**

⁴³³ This ruling is not pertinent because C 377/98 referred to Law 411/97 which approved the ILO convention 151 on the protection of the right to belong to trade unions and the procedure to determine the conditions of employment in the public administration. The Court concluded that the right of public workers to participate in labor decisions that may affect them is compatible with the constitutional competences of the legislator and the executive to determine the conditions of employment, in labor disputes, but not in the definition of the annual wage indexation.

It decided the challenge against Law 628/00 (annual budget law for 2001) arguing the same reasons of the previous ruling: the law did not appropriate enough resources for a complete indexation of public wages. Again, the violation was observed in the message of the President to the Congress. The General Comptroller defended the law because the budget is a projection of expenditures whose amount does not say anything about its execution; if the resources are not sufficient, the lawful act is a budgetary addition but not a declaratory of unconstitutionality. The Ministry of Finance, based on a CONFIS document, defended the law because the critical situation of public finances required the structural adjustment, foreseen to last until 2002 (final date of the EFF arrangement). It sought economic growth, employment, inflation control, a balanced external position and poverty reduction. Redressing public finances is constitutional because it is a “responsible management of the state”. In contrast, the Ministry of Labor Affairs and the Public Ministry supported the respect for the material *res judicata* of C1433/00 (243 P.C.).

The Court rejected the *res judicata* of C 1433/00 because: i) Annual Budget Laws are necessarily different from one year to another because the total amount appropriated annually, the total employment of the state and the public wage policy change. ii) The reform of the Organic Budget Law (OBL) by Law 617/00 impeded also the declaratory of *res judicata* because it limited the annual wage increase to 90% of the inflation target for each year, according to the forecast of the Central Bank. iii) Constitutional *res judicata* refers to the law and not to legislative omissions (345 P.C. and C427/96). iv) The legal duty of indexation is not clearly established in the P.C. and therefore an analysis of the challenge is needed.

First, the concept and relevance of the “Legal Social State” in the interpretation of rights was analyzed. A “brief historic reference” was presented, referring particularly to Germany, Spain and the US. Based on APFR case law, the Court distinguished between the Welfare State, which is seen as an economic concept, and the “Legal Social State”, which considers material equality as a fundamental principle of the functioning of the state, to correct inequalities and to warrant the effectiveness of fundamental rights. The accomplishment of the constitutional principles, rights and duties seeks the realization of social justice and of human dignity. Second, it presented the “concrete expressions of the “Legal Social State””, quoting the P.C. (preamble and articles 1, 2, 13, 42-50, 54, 334, 363 and 366). Particular emphasis was put on the APFR, the principle of solidarity, the public policies to protect vulnerable groups and the recognition of a just social order and of human dignity. Discretionary legal competences and governmental programs should respect the P.C. (150 (19)). The Legislative omission in regulating labor relations (53 P.C.) and in

intervening socio-economic activities (150 (21) and 334 P.C.) does not make the principle of “Legal Social State” innocuous. Based on this argument, the Court justified the direct application of the P.C., interpreting the principles of the labor market, especially the flexibility (“mobility”) of wages. Third, the right to wage indexation was interpreted under the guidelines of the “Legal Social State”. The right to work is a “specific central objective sought by the constituent”, as the case law (C479/92) and the antecedents (Constituent Assembly) of the P.C. (25) have recognized it, but it is also a social duty (53 P.C.). Again, it highlighted the lacking enactment of the Labor Statute by the Congress.

Fourth, the relevance of the right to wage indexation was evaluated. The P.C. (53) was interpreted as the right to wage indexation (C815/99), but nor the P.C. (textual meaning), nor the Constituent Assembly (historic meaning) established this meaning. With the exception of minimum wages, annual wage indexation was not the intention of the constituent. A systematic interpretation is privileged because of i) the goals and fundamental principles of the Legal Social State (preamble and 2 PC); ii) the international treaties adopted by Colombia (93 P.C.), concretely ILO Conventions (95 and 99); iii) the case law recognizing the right to wage indexation.; iv) Law 4/92 which emphasized that the vital minimum should be realized in the same period as the annual budget law. However, this right is not absolute (as all fundamental rights). Past judicial review case law and (mainly) APFR case law were used to conclude that the right cannot be violated arguing general interest reasons, because rights are limitations for majorities. However, labor rights can be affected even in states of economic emergency (215 PC), because a violation of a right is not the same thing as its limitation. Wages are not affected because the discussion is about the percentage of increase. The Court highlighted again the lack of a labor statute (53 P.C.), because Law 4/92 did not realize these constitutional principles. This fact justified the direct application of the P.C., based on its normative character (4 P.C.) and the primacy of inalienable rights (5 P.C.). However, the Court nuanced its intervention, quoting case law that had reiterated the general competence of the Congress.

Fifth, the procedure used by the Court to apply the P.C. directly to the case was the balancing method between precedents and the reasonability test. The Court presented a conflict between constitutional rights, goals and principles and the needed macroeconomic structure to realize the “Legal Social State”. The balancing would show the reasonability of the rule, considering precedents, the rights and goals in conflict. The argumentation did not clarify the object of balancing. Curiously, the Court strongly reiterated the respect of precedents (jurisprudential line) but rejected the conclusions of C1433/00, i.e. the generalized

wage indexation, because it overruled other precedents and interpreted erroneously constitutional budgetary rules. In fact, C1433/00, i) rejected precedents of C710/99 and C815/99 which ordered the inclusion of other criteria when increasing wages, besides past inflation; ii) subjected annual budget laws to Frame laws (addressed to the government). Only the P.C. and the OBL may limit the scope of annual budget laws. This argument was justified again in constitutional case law (although not always pertinent). iii) It changed the precedent on the material and non-mathematical scope of the principle of equality; a generalized wage indexation would give the same treatment to unequals which is unconstitutional, because inflation does not have the same effects from a qualitative point of view. Constitutional rights are not absolute and they should be balanced; C1433/00 ignored the real situation and the macroeconomic goals despite that the constitutional case law recognized it as a constitutional value, particularly the rationalization of public expenditures. The socio-economic situation is relevant, not only in legal theory but also for the constitutional Legal Social State.

Sixth, the nature of annual budget laws was developed to demonstrate the erroneous interpretation by C1433/00 because it ignored the constitutional prohibition to any public power to increase public expenditures. The nature of these laws was explained by the quotation of foreign doctrine, mainly from Germany and other European countries. But mainly case law was the basis of the argument that this statute, despite its technical economic contents, is a formal and material statute. The constitutional regulation was quoted as well as the doctrine on the origins of the budget in democracies, to conclude that budgetary laws are the way by which Congress politically controls the fiscal component of macroeconomic policies. This kind of control is justified because the budget is the legal instrument that presents quantitatively the fulfillment of social policies (equivalent to the effectiveness of constitutional principles, rights and duties).

Once rejected the erroneous interpretation of C1433/00, the Court defined “some constitutional criteria to balance the right to wage indexation in a real and relevant context”. The link between these criteria and the past explanation on the nature of the budget was unclear. This method was explained as a systematic interpretation, balancing a relevant legal and real context⁴³⁴ with the constitutional principles, rights and duties. The criteria defined were: first, the context of enactment and application of the rule: the court argued

⁴³⁴ The consideration of the real context is justified in case law on the state of siege, the procedural failures of statutes and the effectiveness of constitutional principles or rights.

the lack of categorization of public employees by law to define wage **increases** (and not indexation). Ignoring Law 4/92 and the vast regulation on wage scales in the public sector, as “guardian of the PC” it interpreted directly the P.C. (187). It took part of this article, a “weighted average of the changes occurred in the salaries of the employees of the central administration”⁴³⁵ to identify which employees need special protection but not to identify the percentage of wage increase. It concluded that workers under this average have an intangible right to wage indexation which cannot be affected even in serious economic situations. The justification of this decision were mainly policy arguments based on the P.C.: i) (334 and 366), ordering a special protection for the most vulnerable groups in a context of scarcity, **clarifying that this is an additional protection of the vital minimum**; ii) (1 and 13) protecting the dignity of marginalized groups to diminish the distance between rich and poor. The right to wage indexation of workers with wages higher than this average may be limited; a reasonability test should be applied to determine its constitutionality. The test was defined as “strict” because of the “constitutional relevance of the values at risk” because, although the law regulates economic measures, constitutional rights (flexible (“mobile”)) wages, the vital minimum and the dignity) are involved.

Then, the Court applied the reasonability test to the limitation of the right to wage indexation. First, it analyzed whether the goals of the measure were a necessary constitutional goal. The goals identified were the reduction of the fiscal deficit, staff permanency and sustainable social investment. Only the third goal respected the P.C. (2, 44 -5, 47-8, 334 and 366 P.C.) and therefore this goal was reasonable. Second, the means used to obtain the goals were found in the P.C. (366) which orders the prevalence of social expenditure. This argument was not suggested by the government but the Court, as a sort of defendant of the measure, presented it to conclude the “reasonability” of the means⁴³⁶. Third, the Court analyzed the relation between goals and means, i.e., the constitutionality of the prevalence of social expenditure to reach a sustainable social investment, according to the previous test. This justified the inclusion of the factual context in the analysis, synthesized as “the increase of poverty and unemployment, which may further increase with an elevated public debt, affecting future generations”. It concluded that the meaning of the P.C. was “vitalized” and therefore the suspension of some expenditure was justified to allocate resources to social policies. This justification was not presented by the government and contradicted the argument of the need to control the elevated fiscal deficit and debt. The reasonability was accepted if there were no other

⁴³⁵ This argument was presented by a citizen linked to the Ministry of Finance.

⁴³⁶ The Court ignored that wages may be considered as social expenditure as it is the case of the SGP.

ways than the limitation of the right to wage indexation. However, the Court highlighted that the judiciary was not competent to identify a better allocation of resources, which corresponds to the Congress. The criterion of proportionality was included in this third step of the analysis, seeking to identify whether the protection of a constitutional value (social expenditures) would excessively affect other constitutional values. The conflict is between the need to indexate “high wages” (higher than two minimum wages) and the duty to realize the social goals and the principle of solidarity (this argument was created by the Court). The Court deduced that the limitation was proportional and constitutional without developing the potential conflict, nor analyzing who would be affected by the measure or whether the social expenditure would eventually benefit from the resources saved with the measure, if savings were possible. The Court concluded that the test of proportionality depended on the economic context, i.e. the validity of the limitation depended on its temporality and the economic crisis. This decision was justified by the fact that, different from C1433/00, it did not establish a concrete solution, but just the criteria to define the limitation of the right to wage indexation; these are obligatory to the authorities whose acts would be controlled by the administrative jurisdiction. The Court recognized that the definition of wage indexation is a competence of the government (under the legal parameters) controlled by the administrative jurisdiction.⁴³⁷

Seventh, the limitation of the right to wage indexation was distinguished from its restriction or annulation. All wages should annually receive at least a percentage of indexation due the annual character of the budget and the rules of Law 4/92 (C710/99). The Court recognized its lack of competence to establish the percentages but not to establish the criteria for its definition (instead of Congress, and despite Law 4/92): i) equity, progressivity (95 (9) and 363 PC) and proportionality, which are constitutional principles on taxes. The Court ignored the scope of those terms, because progressive is not the same as proportional. The criterion formulated was that higher wages should receive less indexation. ii) The difference among levels should not be “too big” to respect the proportionality. Under those vague and erroneous criteria, the court respected “discretionary competences” of the authorities to establish public wage indexation. It reiterated that this indexation is not covered by the protection of the vital minimum and therefore the APFR did not proceed, despite that this was one of the constitutional values considered in the reasonability test. The P.C. (187) regulated wages of Congressmen, and the Court used it partially to limit public wage indexation but excluded them from the measure because their right to indexation is “a recognition of the exclusive

⁴³⁷ The difference between C1433/00 and C1064/01 was explained by the change of justices.

dedication to the political representation with a severe regime of incompatibilities” and therefore it was just because when applying the formula of C 1433/00 their increase would be higher.

Eight, the Court ordered that fiscal savings should be allocated to social expenditure and not to cover fiscal deficit (366 and 350 PC). This order was justified by the absence of law and case law on the Planning Law (C557/00 and C 1433/00), and as the basis of the solidarity principle and the material equality (13 P.C.) as goals of the state. This decision was supported in its own case law on ESC rights; and it is at least curious that the limitation of a social right was justified by the realization of social goals. Social programs that would benefit from the ruling could be chosen by the government, but respecting the social goals of the PC. It concluded that the PC did not forbid the consideration of macroeconomic constraints, but its balancing, its constitutional relevance and its compulsory character depend on the arguments presented by the authorities which in this case was omitted. Contrary to the previous reasoning, the Court affirmed that this omission cannot be filled by the Court to change precedents or to accept higher limitations of rights.

Four dissenting votes basically supported the precedent of C 1433/00 based on the P.C. (243). They highlighted the lack of methodology of the Court, even quoting rulings in a contrary sense of their real scope (C427/96). This ruling was accused of being ambiguous and not pertinent because the conflict between wage indexation and social expenditure was not presented in the challenge nor in the P.C. The Court used reasons of convenience and not of constitutionality, exceeding its competences and violating constitutional labor rights and the Legal Social State.

▪ **Ruling C551/03**

In 2002, the annual budget law was not challenged; but in 2003, two statutes referring to wage indexation were studied by the Court. This ruling corresponded to the automatic control of Law 796/03 which contained the text of a constitutional reform to be submitted to a referendum. Some macroeconomic measures were included seeking to reach the goals of the structural adjustment program (First Standby Arrangement). The measures were, i) point 8 of Law 796/03 added the P.C. (187), freezing for two years pensions and wages up to 25 minimum wages, except for the Military; ii) point 14 of Law 796/03 added the P.C. (345), ordering that functioning expenditures of all public entities, including wages and pensions up to two minimum wages would be frozen for two years, excluding the SGP and resources allocated for democratic security (except wages). The ruling clarified that if at the end of 2003 and 2004 the annual

increase of inflation would be superior to the one of 2002, wages and pensions would increase in a percentage equivalent to the difference between the inflation registered in each of these years and the one of 2002. The fiscal saving obtained by the territorial entities should be allocated to the Pensions Fund, to the labor benefits of the educational personnel and to the pension liabilities of the health sector.⁴³⁸

From a large list of interveners, the main arguments were summarized as follows: 1) the Legal Social State is violated (2, 10, 50, 112 P.C.) because the new economic and social reality cannot ignore constitutional principles (17 P.C.) which are intangible and cannot be reformed by referendum; 2) The contents of the P.C. should be broad enough to support social, economic and cultural changes because they are not designed to solve conjunctural problems (49, 52,64,154 P.C.); as a result, some issues should not be included in a P.C. (3) the referendum cannot be used to derogate statutes referring to international treaties, budgets, or tax issues (4, 23, 41, 61, 83, 113 137 and 154 P.C.) because only the Congress has this competence (61, 64, 81 P.C.).

Arguments concerning point 8 rejected the intervention of the State if it affects the freedom of employees and employers to negotiate the conditions of employment. The measures were accused of violating international treaties, collective bargains (4, 7, 23, 37, 90, 130, 141 P.C.), the human dignity, the flexibility (“mobility”) of wages (60 P.C.) and the Legal Social State (32, 37-8, 44, 47, 115 P.C.). The interveners argued that they are the concretization of the Standby arrangement, focusing on debt payments (which was a conjunctural situation), ignoring the sovereignty (65 P.C.) and the obligatory social policies (9, 23, 68 P.C.). Reinforcing past arguments, public wages were presented as an investment whose freezing reduced social expenditure, thus violating the P.C. (60, 67-8, 77-8, 88, 92 154) and the international law and collective bargains (4, 7, 23, 37, 130 P.C.). The President defended the referendum, arguing that citizens are sovereign to reform the P.C. and therefore, international treaties that form a constitutional bloc cannot be a “perpetual pact” that obstructs their will. ILO Conventions can be denounced, but also the transaction in trade unions evolves. This position was defended by an ex-constituent who favored the possibility of a renegotiation of treaties after a constitutional reform. The Academy argued that the referendum cannot modify international treaties because the country cannot rule against the international legal order (93 PC). As a result, those points are unconstitutional because international duties are not renounceable. Trade Unions rejected the inclusion of the requests of the IMF, because they worsen labor rights and violate ILO

⁴³⁸ It is not clear if the Constitutional Court considered those items as social expenditure.

Conventions (97-8 and 151). Moreover, those fiscal measures were not typical constitutional rules. Another former constituent supported this argument, highlighting their legislative but not constitutional character. The Public Ministry argued that these points were not justified enough in the exposition of motivations which complicates the legal analysis; however, those rules do not have the normative nature of a referendum but rather the one of ordinary laws.

The Court rejected the charge based on the textual reading of the PC (170) which established that a referendum is not possible with respect to laws approving international treaties or the budget, or laws on fiscal and tax issues. The Court adopted a systematic interpretation and decided that the P.C. referred to referendums derogating laws and not to constitutional reforms, and the initiative is governmental and not popular. The Court also rejected the argument that the reforms are typical for a law or a popular consultation but not for a constitutional reform. However, it recognized the lack of technique, which does not imply unconstitutionality. The same argument was used against the charge of its temporal character. The Court defended the inclusion of those issues in a constitutional reform because they were contrary to C1064/01. The argumentation based on the violation of ILO conventions, the ICESCR and the Pact of San Salvador was rejected because it was just a formal control of constitutionality which excluded a material analysis. However, it concluded that point 8 did not violate those treaties, because it referred only to high pensions (omitting a reference to wages). Neither did point 14, because ICSCER (7) and the San Salvador Pact (7) established the duty for the states to warrant wages that assure a dignified life. In addition, ILO Conventions protect minimum wages, but none of them forbid that in times of crisis wages may be temporally frozen under the principle of proportionality. The right to negotiate collective bargains was not violated neither. It established that under adjustment programs those rights may be restricted and even regressed, if the states present the need and proportionality of the measure, considering the totality of protected rights and protecting the most vulnerable sectors (General Comment 3/90). The restriction of the referendum fulfilled the requisites imposed by international organisms: temporality, equity and protection of most vulnerable workers. Arguments on the erratic policies of adjustment were also rejected because they should be analyzed in a judicial review action against statutes but not against a constitutional reform where arguments of convenience do not proceed. The reform limits rights but does not substitute the P.C. and therefore it is constitutional, despite that it rejected other arguments than procedural failures.

Two dissenting votes argued that the suspension of constitutional rules of the Legal Social State is unconstitutional. The reform is one of the reforms of the IMF arrangements and there are other ways to protect the Legal Social State than constitutionalizing conjunctural policies. Law 4/92 should have been applied to solve problems regulated by points 8 and 14, but the purpose was to elude the P.C. and the international legal order as ILO Conventions.

▪ **Ruling C1017/03**

This ruling decided the challenge against Law 780/02, Annual Budget Law for 2003. The challenge was the same as in C1433/00 and C1064/01 based on the same articles of the P.C. (1, 2, 22, 25, 53-4, 85, 334, 366 and 363), on Law 4/92 and on the International Covenant on ESC rights (7), the International Covenant on Civil and Political Rights (26), both approved by Law 74/68, and the International Convention on Human Rights (26) approved by Law 16/72. The challenge rejected the declaration of material *res judicata* because past rulings did not constitute a uniform precedent. A new argument was that this annual budget Law is an inequity in the public charges.

The Ministry of Finance defended the constitutional competences (150 (19e), 189 (14) P.C.) of the Congress and the government to define public wages. Law 780/02 followed the case law criteria, respecting the availability of resources, taking into account that a higher indebtedness violates the P.C. (347), the OBL, Law 617/00 (92) and case law (C1064/01). The indexation of medium and higher wages is not a “matter of life” but a variation of behavior, and therefore the right to equality is fulfilled when wages under two minimum wages are indexed. It based its argument on the case law on the flexibility (“mobility”) of wages (53 P.C.). The Public Ministry supported the doctrine of C1433/00, using also as support case law on wage flexibility (“mobility”), and concluded that a selective indexation implied an unjust enrichment for the employer (C815/99).

The Court first distinguished between precedent and *res judicata*, based on several case law. It concluded that it has been unanimously recognized that in rulings referring to annual budget laws, even if the legal problems are similar, *res judicata* does not exist but precedents exist that should be protected to respect legal certainty, the principle of equity and the confidence. Justices should show “jurisprudential consistency” except in the presence of strong reasons that justify overruling precedents. C1064/01 was recognized as precedent, but clarifying the holder of the right to wage indexation and the scope of the

principle of progressivity. The relevance of the specific legal and factual contexts in this adjudication was highlighted.

Second, the right to wage indexation has been consistently recognized by the case law (C815/99; C1433/00; C1064/01), and has been based on a systematic interpretation of the P.C. (1, 2, 25, 53, 95 (9)) and international treaties (rejected in C 551/03). Although all public workers are holder of the right, the scope is different, depending on i) the holder, ii) the principles of solidarity (1 P.C.) and material equality (13 PC), iii) the conditions of its implementation, and iv) the circumstances in which it is invoked. Based on judicial review and APFR case law, the Court found a larger scope for low salaries because it is an intangible right, whereas for the rest, the right can be limited (C1064/01). The justification of the limitation was the specific goal of public interest and the measures to reach it. The constitutionality would depend on the justification of the limitation, because this is the way to respect constitutional principles, rights and duties. Not only the will of the authorities count. The arguments of the justification depend on the concrete normative and factual context. Despite this curious form of subjective judicial review analysis, in which convenience arguments were more important than rules, and despite that the Court found that the authorities did not justify the change of criterion to index ate, it analyzed inflation and the normative context of Law 796/03, filling the gap left by the authorities and ignoring again the annual budget law and the scope of the judicial review.

Third, the strict test of constitutionality adopted by C1064/01 was reiterated, highlighting that the legal and factual context of the case differed. Considering the criteria of proportionality, progressivity and temporality, there is a need to define when the limitation is excessive, because the right to wage indexation has been limited each year. For the purposes of the principle of proportionality, the Court defined when the core content of the right is affected to middle and high levels, because the authorities omitted this duty of definition. The temporality and the principle of progressivity sought that the limitation is relaxed in time “reflecting public policy on wages, which should create the conditions for wage indexation”. The Court extended the scope of the constitutional tax principle of progressivity and argued that the relation between progressivity and temporality is crucial, because it was not the first year that the right was limited. However, the Court defended the government, clarifying that this was due not only to the public policies, but to “political and economic variables not controlled by the authorities” and quoted C551/01 as support. It added that wages depend on the fluctuations of the market ignoring that the discussion was not on the

determination of the value of the work but on wage indexation, which is a completely different economic phenomenon. The Court decided that the presidential and congressional term of four years (132 and 190 P.C.) was a reasonable term to define wage policy that should be “reflected in the development plan” (339-341 P.C.). Annual budget laws (346 P.C.) should be coordinated with the development plan and the evolution of the wage policy in this period should be coordinated with macroeconomic goals and social policies and the “modernization of the state” included in the National Development Plan. The wage policy should also be justified in the presentation of the investment plan to the Congress, indicating its “goals, parameters and magnitude”. This means that the mandate of the Court⁴³⁹ would be applied to the next presidential period, i.e. in 2006. It concluded that a “systematic and undefined wage reduction” was unconstitutional because the right became nugatory. Although political reasons may not be legally relevant for the constitutional analysis, these decisions should be taken “after a large, public, participative and transparent deliberation”. The construction of arguments *a posteriori* to defend the law in tribunals was not accepted; however, this has exactly been the behavior of the government, accepted by the Court and even supported in the argumentation. The Court denounced a more restrictive limitation of the right to wage indexation without justification. Notwithstanding, it decided that the evaluation should be performed at the end of the National Development Plan (2006) where the limitation should have been relaxed to respect the P.C. (53). This mandate did not have any effect because the Court eliminated any legal consequence of this duty when it concluded that it did not represent a debt of the state (i.e. the non adjusted percentage should not be reimbursed at the end of the period) but that was a fiscal saving to assure social expenditure. The justification was that the reimbursement would be contrary to the justifications of the limitation: the macroeconomic policy seeking to reduce the fiscal deficit (argument rejected by the Court but inexplicably justified here) and to protect social expenditure. This way it established a contribution that public workers with medium and high wages should pay to cover social policies. The right remained unprotected and the Court created a contribution that can only be established by the legislator (363 P.C.). Although the declaratory of unconstitutionality should have been the consequence, it was not possible because it would block the execution of the budget, which would be legally absurd.

Fourth, the scope of the right was analyzed according to the specific legal and macroeconomic context. This analysis was called “the silence of the legislator and the prudence of the judiciary”. The Court justified

⁴³⁹ This rule is not a constitutional regulation. The Court called ‘systematic interpretation’, the consideration of phrases and not articles of the P.C. used in the interest of its own argumentation.

again its activism (ruling beyond the scope of the constitutional text) by referring to the lack of legislative development of the P.C. (53) and the lack of regulation of the issue by the OBL and by the National Development Plan.⁴⁴⁰ The Court itself indicated that this judicial activism should follow the rules of “judicial prudence”, defined as not proposing formula for public wage indexation. The authorities should justify the limitation of the right *ex ante* to allow the realization of the strict test of constitutionality because the judge cannot assume the charge of justification of a rule affecting “the vital minimum”. This argument contradicted C1064/01 where it excluded from the debate this concept of “vital minimum”.

Fifth, the context of Law 780/02 was evaluated although the authorities did not justify the modality and degree of limitation of the right to wage indexation. The Court, based on the presentation of the law to the Congress and on the exposition of motivation, tried to identify the scope of the limitation to apply the precedent. **First**, the Court studied the socio-economic context where public wages adjustment, fiscal deficit and debt were considered as notorious facts and conceded to these variables a constitutional value, based on past case law.⁴⁴¹ Then it summarized the evolution of public wage indexation since 2000, on the basis of the Decrees that define the adjustment.⁴⁴² It concluded that in all the years except in 2000 (due to C1433/00) public wage adjustment was systematically below the past (caused) inflation rate, constituting a continuous loss of purchasing power of middle and high public wages. For 2003, the government explained that wage adjustment was realized under the parameters of C1064/01 but also of Law 617/00 (92) which ordered a maximum increase of 90% of the past inflation rate. As a result, only for legal minimum wages the indexation was complete, but for the rest the adjustment was below the “weighted average” (1% or less). The Court concluded that it did not find: i) any justification to limit once again the right; 2) the constitutional reasonability of the scale of public wages and the “progressive limitation” of the indexation; and 3) the relevance of the economic situation to limit the right. The Court analyzed the National Development Plan which did not regulate wage indexation, nor its relation with the macroeconomic goals. The fiscal deficit was also analyzed due to “its relevance for the macroeconomic stability and for the capacity of the state to finance social expenditure”; the data were presented by the government to justify

⁴⁴⁰ It is formed by a general part and by the Investment Plan of national public entities. The first includes: i) the long term purposes and objectives, ii) the purposes and priorities for the intermediate term and iii) the general guidelines for the economic, social and environmental policies. The second is formed by a multiyear budget of the main programs and plans of national public investment, particularly specifying the resources that will fund them (339 P.C.).

⁴⁴¹ Rulings analyzing annual budget laws where the balancing of the rationalization of public expenditure was constitutionally relevant; i.e., when the goals of the macroeconomic policies were valued as a form of necessary general interest. It referred basically to adjudications on C 617/00 analyzed in chapter five.

⁴⁴² These decrees should have been the challenged legal acts, because they establish the potential violation of the P.C. The competence would thus have been of the administrative jurisdiction.

the limitation of the right. **Second**, the Court evaluated the relevant legal context, where Law 796/03 was considered as temporarily legally relevant, because the intention of the legislator for 2003 was expressed by establishing a specific parameter for wage indexation. However, the indexation ordered by this law was completely ignored by the Court, and it took only one part of the Law to replace the criteria established in C1064/01. Notwithstanding, it concluded that the limitation of the right to wage indexation was not justified.

Sixth, the Court analyzed the constitutionality of Law 780/02. From C1064/01, it ratified the lack of legislative omission because the law only established a global amount to cover current expenditures (public wages included). This appropriation did not reflect a decision to limit the right and the historic interpretation “confirmed” this argument. However, the Court reiterated that legislative antecedents showed the explicit policy of the government to reduce public wages seeking the reduction of the public deficit. To this intention the Court applied the strict test of constitutionality. It changed the doctrine of C1064/04 because the goal of the test was to verify whether the limitation of the right to wage indexation affects the vital minimum, although it referred only to medium and high salaries:⁴⁴³ 1) The analyzed source (to establish whether the goal of the limitation was necessary) was the message of the government to the Congress. Contrary to C1064/01, the Court upheld the reduction of the fiscal deficit to reach the macroeconomic equilibrium. It is constitutional and necessary “because the constitutional doctrine recognized it as a public interest”. It did not explain this change of precedent. 2) The Court accepted that the limitation of the right to wage indexation is a “legitimate way to reach the objectives of the government”, contrary to the precedent and the proofs. 3) It evaluated the reasonability of the relation between means and goals, i.e. whether the means were necessary, proportional and respected the temporality to reach the goal. It remarked a lack of permanent rules establishing permanent criteria on the scope of labor rights and the non accomplishment of the argumentative duty of the authorities to justify the limitation. Despite this non accomplishment, the Court reiterated C1064/01 on the intangibility of low wages. However, it overruled this precedent partially because Law 796/03 showed the legislative intention and thus, it is more relevant than the interpretation of the P.C. (187) in C1064/01. The Court systematized which rules of C1064/01 confirmed: i) the application of the principle of progressiveness and proportionality to wage scales; ii) that savings obtained as a result of the limitation of the right to indexation for medium and high salaries should prioritize objectives of constitutional social expenditure.⁴⁴⁴

⁴⁴³ The Court revised a public policy and not a law, but the P.C. (241) did not establish the constitutional control of public policies.

⁴⁴⁴ This criterion was not mentioned before, nor analyzed.

This ruling included some new elements: First, the limitation of the right in the preceding two years (2002-3) without taking previous years as it analyzed before. In 2002 the law did not respect C1064/01 without any justification and the scope of the limitation for medium and large wages was not justified. From those observations, and considering i) the “principle of progressiveness” and ii) the constitutional instruments of macroeconomic policy, the Court gave the authorities a temporal limit (4 years) to completely update public wages. The limitation of the right to wage indexation cannot imply a permanent trend of losing their purchasing power. These jurisprudential parameters had to be respected, except in the presence of “powerful justifications”. Second, the law did not respect the core content of the right because it did not establish a reasonable and constitutional limit, nor did it guide the Court in its establishment. The regression of wages was recognized since 1998 (except in 2000), and not, as it affirmed before, only in the last two years. The Court modified the precedent of C1064/01 based on the following: i) the absence of a clear legal parameter, ii) the lack of argumentation to justify the measure, iii) the context, iv) the lack of competence of the Court to value the concrete implications of defining a specific limit to wage indexation and to justify the limitation. The Court, instead of applying Law 4/92 defined a non constitutional criterion of “justice and equity” which is “the just middle”. Concretely, for 2003, 50% of the past inflation rate was the limit to respect the principle of proportionality, taking into account the facts and silences referred to. This new parameter ignored constitutional and legal rules and contradicted the argument of the direct application of the P.C. However, the Court clarified that this parameter did not prohibit the government to consider statistical data and criteria of public policy (included in Law 4/92) because it only reiterated the principles of C1064/01.

Concerning social expenditure, the ruling added that “the savings obtained” did not have to be appropriated in that year but social expenditure had to be made sustainable in a context of fiscal deficit. The General Comptroller had to control the accomplishment of this ruling. Workers who did not receive the full indexation had to receive it progressively before the end of each national development plan (four presidential years) until getting the 100% of the indexation. Contradictorily, it added that this was not a duty of the state but a fiscal saving to make social expenditure sustainable⁴⁴⁵ and that this interpretation had to be a goal of public policies. Although it found a total lack of justification of the limitation, it rhetorically

⁴⁴⁵ This new argument, created in practice a new tax or fiscal contribution, because workers with wages up to two minimum wages were obliged to contribute to social expenditure with the annual indexation of their wages.

repeated that in the future the regulating authorities should present more relevant reasons if they want to limit the right because the control of the fiscal deficit is not a valid argument to maintain situations that can violate constitutional rights. Provided that the Congress did not regulate the issue, the Court had to establish the regulatory parameters, involving public expenditure. The Court accepted the impossibility to strike down the statute or condition its constitutionality because it would obstruct the budgetary execution. It used its non-constitutional competence of ordering (which was exactly one of the arguments to overrule C1433/00) the government to foresee the necessary resources to cover the functioning of the state (113 and 346 P.C.) thus taking over a task of the Congress: i) the legislator had to establish flexible guidelines for wage indexation according to the macroeconomic objectives; 2) the National Development Plan had to include in its general part the way wage indexation was included in the macroeconomic policy; iii) the government had to allocate enough resources to cover wage indexation, and “if necessary” iv) a transitory limitation under the “constitutional extremes” should be justified. These parameters of constitutional interpretation were obligatory for wage policies, i.e. they became a legal rule.

Three dissenting votes defended the validity of the precedent of C1433/00, adding that a non indexation required a constitutional reform as Law 796/03 did. They rejected also the peculiar application of the tax principle of progressiveness.

▪ **Ruling C931/04**

This adjudication decided the challenge against Law 848/03. The charges were the same, adding some arguments based on the results of the referendum. The challenge defended the non existence of *res judicata* because the abstention in the referendum was a new element, recognized by the P.C. (378). Therefore, the law violates the P.C. (3, 103). It added that a wage increase (a real increase of its value) is not the same as a wage indexation (maintaining its purchasing power) and therefore, it was erroneous for the government to present an adjustment below the inflation rate of 2003 as an increase. Curiously, it demanded the respect of the precedent of C1017/03, balancing the right and applying the principles of solidarity and proportionality of wage indexation.

The government defended the law based on the expectation that it had about the results of the referendum and proposed, if necessary, a budgetary adjustment according to the constitutional case law and the OBL. During the procedure of the bill the Congress questioned the methodology used by the government, based

on the hypothetical approval of the referendum.⁴⁴⁶ It affirmed that the macroeconomic assumptions for 2004 sought a budgetary congruence with i) the goals of the public fiscal deficit approved by the monetary authorities (CONPES and CONFIS), ii) the available levels of functioning, and iii) the accomplishment of priority duties of social expenditures, the recovery of the economic growth and the generation of employment. It argued also the possibility to present additional bills to cover the deficits of the annual budget law (347 P.C.). However, based on the P.C. and the OBL, it concluded that i) budgetary obligations had to correspond to fiscal (availability of resources) and constitutional (rule of law of the budget) conditions; ii) a wage freeze above two minimum wages did not violate international treaties according to C551/03; iii) the equality is real and effective and not mathematic and, based on past case law; it reiterated that the right to wage indexation is not absolute; most vulnerable groups and the principles of solidarity and proportionality of a Legal Social State were fully protected according to the “economic reality, the real equality and the vital minimum”. Then it presented the macroeconomic issues that justified Law 848/03: i) macroeconomic stability and fiscal sustainability which is the “most important collective patrimony of any society”. They are the necessary conditions to promote investment, economic growth, employment and redistributive public expenditure to warrant fundamental rights. ii) Public debt increased to close to 52% of GDP, which represented a fragile international situation for the country according to the IMF (quoting a text not referring specifically to the case of Colombia). iii) Public employees have had on average higher increases than the private sector, and those increases should depend on productivity, responsibility etc⁴⁴⁷. The government respected C1017/03, although they froze wages above two minimum wages, and limited the indexation because it was necessary to enlarge social expenditure (despite the worrying level of public debt) to protect most vulnerable groups. Despite those arguments, it promised to realize the budgetary transfers and additions after the results of the referendum and added that the government was preparing a bill to establish the criteria to annually adjust public wages according to case law.

The Public Ministry defended again its position on the constitutionality of the annual budget law except for the omission of appropriating enough resources to completely indexate public wages. He remarked the lack of *res judicata* and even of precedents, because the case law had not been uniform; on the contrary, it had been varying, based on arguments of macroeconomic policy and not on the legal content of the P.C.

⁴⁴⁶ The Ministry of Finance argued that the abstention in a constitutional referendum did not have legal effects. Law 134/94 (46), which regulates the mechanisms of democratic participation, limited the possibilities to discuss again the proposals submitted in a referendum that were rejected. The lack of votes to be valid (abstention) is not the same as a rejection and therefore the Congress did not lose the competence to discuss again the issues included in Law 796/03.

⁴⁴⁷ Those criteria were included in Law 4/92 to define public wages but not to indexate them.

The limitation of the wage indexation for middle classes is a paradox because they contribute the most to fiscal charges. The principle of progressiveness did not exist because the level of wages depends on knowledge, experience and responsibility (as Law 4/92 established for the definition of public wages). The temporality was also violated because the right has been limited since 1999. He affirmed that the law must respect the P.C. and the popular will and criticized the contractive policy of IMF.

The Court requested as proofs up to date information on the adjustment of public wages and the Ministry of Finance reiterated that the referendum and the P.C. were the basis of wage liquidation for 2004, but that they were evaluating whether a budgetary transfer or addition was necessary to comply with C1017/03.

The legal reasoning of the Court reiterated case law supporting the inexistence of *res judicata* in the analysis of annual budget laws, and included as a new fact the voting results of the referendum. However, to protect legal certainty, confidence and equality it respected the precedents (C815/99, C1433/00, C1064/01 and C1017/03) "in the context of the legal and factual circumstances", i.e. the legal consequences of each ruling are different because the specific circumstances differ. The lack of regulation of the P.C. (53) justified the direct interpretation of the P.C. by the Court. Each of these precedents was quoted extensively to explain that the generally accepted precedents were that: i) labor rights regulated by the P.C. (53) are not absolute; ii) the right to wage indexation may be limited but not violated; this limitation should comply with the strict test of reasonability (constitutionality). The ruling added that the goals of macroeconomic policy may be one justification to be submitted to this test. iii) The inflation rate does not affect public workers in the same way and thus, wage adjustments may differ, although it should be annual, general (to all workers), and respecting the principles of equity, progressiveness and proportionality. iv) The limited wages should benefit, during the period of the National Development Plan (4 years), from a progressive increase until reaching the 100% of indexation. v) The legal and real context of the annual budget law and, added in this ruling, "the macroeconomic policy" are relevant factors to determine the reasonability.

On these grounds, the Court analyzed the context of Law 848/03. It verified that its enactment was posterior to the voting process of the referendum but before the certification of the National Electoral Council. This fact was accepted as a justification of the adoption of the parameters of the disapproved referendum (Law 796/003). First, the Court analyzed the socio economic context and clarified that it had

not to evaluate the macroeconomic variables and the fiscal policy; it did not have to evaluate whether the limitation of the right to wage indexation was reasonable in the factual and temporal context. From the antecedents of the Law (the intervention of the government in the Congress) it deduced that the real context was similar but not identical to the one of the preceding years⁴⁴⁸: although the fiscal deficit and the public debt remained elevated, the inflation rate dropped. It analyzed why they froze wages superior to two minimum wages which, according to the government, represented only 30% of the work force.⁴⁴⁹ The Court repeated the arguments of the Ministry, highlighting that in the Congress the wage freeze was criticized, but the measure was approved, and until the date of this ruling, the government did not realize any budgetary transfer or addition.

Before analyzing the normative context, the Court rejected the charge based on the legal effects of the abstention (3, 103, 378 P.C.) for the only reason that it lacked a “normative constitutional basis”⁴⁵⁰. The main fact observed in the normative context of Law 848/03 was the loss of legal effects of Law 769/03 (the referendum). The Court applied the strict test of reasonability to the legislative antecedents of Law 848/03. The justifications of the limitation were the fiscal problems and macroeconomic goals such as growth, confidence and private investment to reduce unemployment, poverty, inequity and maximize the welfare of the society. Despite the need for adjustment, the government asked the Congress to take the budgetary appropriations to support social and economic development into account, because the intention of the Law was clear. However, it analyzed again the exposition of motivations of Law 796/03 (which lacked legal effects) “to identify potential additional justifications of the limitation imposed to public wage indexation”. As a result, the Court highlighted the motivations of the referendum: the reduction of the fiscal deficit, public debt and sustainability of social expenditure, complementary to the security strategy.⁴⁵¹ These justifications, from the perspective of the precedents, did not pass the test because the need, proportionality and reasonability of the limitation were not proved and because it did not analyze the cumulated incidence of former restrictions and the differential effect of wage scales. They were abstract justifications that impede the balancing of the limitation vis-à-vis relevant constitutional benefits. Paradoxically, the Court continued with the strict test of “reasonability”: i) As an objective of the limitation,

⁴⁴⁸ The compliance of C1017/03 by Decree 3569/03 (4) was highlighted.

⁴⁴⁹ Personnel expenditures represented 3.2% of GDP and 21.4 % of current expenditures. The increase vis-à-vis 2003 was 7.1% due to the increase in expenditures in defense and security.

⁴⁵⁰ This contrasts with the dozen of pages used for repeating past case law on the relevance of the context in annual budget laws, constitutional analysis and the origins of the Legal Social State.

⁴⁵¹ The Court instead of analyzing legislation in force, considered the legal relevance of the motivation of the rules not in force.

the Court mentioned again the reduction of the fiscal deficit and the public debt. In this opportunity, it was considered as necessary and constitutionally valid and therefore it “approved the test”, according to the precedents. The Court added that the necessary constitutional goal of preserving the macroeconomic stability is the protection of public expenditure (350 P.C.) “to assure the effectiveness of the solidarity as a principle of the Legal Social State”. Again, this argument was not presented by the government. ii) As means, the Court signaled the wage freeze, which was judged as neither proportional nor progressive and therefore unconstitutional. iii) Concerning the relation between means and goals, the Court concluded that the justifications had an economic nature and not a constitutional one; the Court cannot replace the authorities in the argumentative duty. Therefore, the analysis of the modality and degree of limitation and its justification was not possible. It conditioned the constitutionality to the respect of C1017/03 (which did not declare this conditionality) but considering the “particular” legal context.

In the annual budget law for 2005, the limit of 50% would be unconstitutional because of the cumulated effect of the limitation, and the end of the National Development Plan (4 years). Therefore, the complete indexation of wages would have to be recognized. Following C1017/03 it repeated that this is not a debt of the state to be paid retroactively, but in this case it omitted that the savings should be spent on social expenditures. For 2004, it reiterated C1017/03 and ordered the necessary budgetary additions or transfers. Dissenting votes were the same as in C1017/03.

Table 6.7 Summary of arguments on wage indexation

Ruling	Arguments of the government	Arguments of the Constitutional Court	Dissenting votes (DV) Concurring Votes (CV)
C1433/00	Ministry of Finance: Wage policy was not included in the Annual Budget Law (ABL)	<ul style="list-style-type: none"> -ABL should appropriate enough resources to comply with the duty of wage indexation. -The letter that the government sent to the Congress on the bill of ABL contained the violation to the P.C. -The right to wage indexation was justified in the P.C. (53, 150(19)) as obligatory and in Law 4/92 (frame law to establish public wages by the government) and in precedents 5C710/99 and C815/99). -The macroeconomic criterion was not reasonable and violated the principle of equity. 	<ul style="list-style-type: none"> 1 DV: “flexible (mobile) wages” is an undetermined concept and multiple interpretations are possible. -L4/92 obliges the government but not the Congress. - ABL defined a total amount without indicating its distribution. -Wage policy is the competence of other authorities.

			1DV: - The constitutional control does not apply to non legal acts as legislative omissions.
C1064/01	<p>Ministry of Finance: -A CONFIS document: showed the critical situation of public finances and justified the structural adjustment, foreseen until 2002. It sought economic growth, employment, inflation control, a balanced external position and poverty reduction. -The redress of public finances is constitutional because it is a "responsible management of the state". Ministry of Labor Affairs: Supported the respect for the material <i>res judicata</i> of C1433/00.</p>	<p>- <i>Res judicata</i> of C 1433/00 was rejected because: i) ABL is different each year (the total amount appropriated, the total employment of the state and public wage policy). ii) The reform of the OBL by Law 617/00. iii) <i>Res judicata</i> refers to the law and not to legislative omissions. iv)The duty of indexation is not established in the P.C -Nor the P.C. (textual meaning), nor the Constituent Assembly (historic meaning) established the right to wage indexation except for minimum wages. A systematic interpretation should consider i) the goals and principles of the Legal Social State, ii) international treaties (93 P.C, ILO Conventions (95 and 99)); iii) case law recognizing the right to wage indexation. iv) Law 4/92 - This right is not absolute. Labor rights can be affected even in states of economic emergency, because its violation is not the same as its limitation. -Law 4/92 did not realize constitutional labor principles and direct application of the P.C was justified, but recognizing the competence of the Congress. The procedure to apply the P.C. directly was the balancing method between precedents and the reasonability test and between constitutional rights, goals and principles and the macroeconomic structure to realize the "Legal Social State". C1433/00 rejected precedents of C710/99 and C815/99 and ignored macroeconomic goals despite that constitutional case law recognized it as a constitutional value. -"Constitutional criteria to balance the right to wage indexation in a real and relevant context". i) the context of enactment and application of the rule: it interpreted directly the P.C. (187) to identify the employees in need of special protection but not to identify the percentage of wage increase. The justification consisted of policy arguments based on the P.C. The right to wage indexation for workers with wages higher than this average may be limited, whose reasonability and strict test determine its constitutionality --This test considered first, whether the goals of the measure were a necessary constitutional goal (the reduction of the fiscal deficit, the staff permanency and a sustainable social investment). Only the third respected the P.C. and was reasonable. Second, the means used to obtain the goals were found in the P.C.(366): the prevalence of social expenditure. Third, the relation between goals and means: the constitutionality of the prevalence of social expenditure to reach a sustainable social investment; the criterion of proportionality was included to identify whether the protection of a constitutional value (social expenditures) would excessively affect other constitutional values. The limitation was proportional and constitutional. The test of proportionality depended on the economic context. ii) The difference among levels should not be "too big" to respect the proportionality. This indexation is not covered by the protection of the vital minimum and the APFR did not</p>	<p>Three DV: Defended the validity of precedent C1433/00, - A non indexation required a constitutional reform as Law 796/03 did. -They rejected the application of the tax principle of progressiveness</p>

		<p>proceed.</p> <p>iii) Fiscal savings should be allocated to social expenditure and not to cover fiscal deficit. This order was justified in the absence of law and case law on the Planning Law, and as the basis of the solidarity principle and the material equality as goals of the state.</p> <p>-The PC accepts macroeconomic constraints, but its balancing, constitutional relevance and compulsory character depend on the arguments of the authorities.</p>	
C1017/01	<p>Ministry of Finance, the Congress and the government have constitutional competences (150 (19e), 189 (14) P.C.) to define public wages. The law followed the case law criteria, respecting the availability of resources.</p> <p>-A higher indebtedness violates the P.C. (347), the OBL, Law 617/00 (92) and case law (C1064/01).</p> <p>-The right to equality is fulfilled when wages fewer than 2 minimum wages are indexed (53 P.C.).</p>	<p><i>Res judicata</i> does not exist for rulings on Annual Budget Laws but precedents should be protected to respect legal certainty, the principle of equity and the confidence. C1064/01 was a precedent, but it clarified the holder of the right to wage indexation and the scope of the principle of progressiveness. The relevance of the specific legal and factual contexts in this adjudication was highlighted.</p> <p>The right to wage indexation has been recognized by case law based on a systematic interpretation of the P.C. and international treaties.</p> <p>The scope of the right depends on i) the holder, ii) the principles of solidarity and material equality iii) the conditions of its implementation and, iv) the circumstances.</p> <p>The limitation is justified in the public interest. The constitutionality depends on its justification because this is the way to respect constitutional principles, rights and duties. The justification depends on the concrete normative and factual context.</p> <p>Third, the strict test of constitutionality of C1064/01 was reiterated, but the legal and factual context were different. For the principle of proportionality, the Court defined the core content of the right for middle and high levels, because the authorities omitted this duty. The temporality and the principle of progressiveness sought that the limitation is relaxed in time. The scope of the constitutional tax principle of progressiveness was used because it was not the first year that the right was limited, due to public policies and to “political and economic variables not controlled by the authorities”. The presidential and congressional term of four years was a reasonable term to define wage policies that should be “reflected in the development plan”. The wage policy should also be justified in the presentation of the investment plan to the Congress, indicating its “goals, parameters and magnitude”. A “systematic and undefined wage reduction” was unconstitutional because the right became nugatory. Although political reasons may not be relevant for constitutional analyses, these decisions should be taken “after a large, public, participative and transparent deliberation”.</p> <p>The construction of arguments <i>a posteriori</i> to defend the law in tribunals was not accepted.</p> <p>This is a debt of the state (i.e. the non adjusted percentage should not be reimbursed at the end of the period) but a fiscal saving to assure social expenditure.</p> <p>The scope of the right was analyzed according to the specific legal and macroeconomic context: “the silence of the legislator and the prudence of the judiciary”. The limitation of the right should be justified <i>ex ante</i> to allow the realization of the strict</p>	

		<p>test of constitutionality because the judge cannot assume the charge of justification of a rule affecting “the vital minimum”. The scope of the limitation to apply the precedent: First, public wages adjustment, fiscal deficit and debt were notorious facts that have constitutional value (case law). The evolution of public wage indexation since 2000, on the basis of the Decrees that define the adjustment allowed concluding a continuous loss of purchasing power of middle and high public wages. The Court did not find: i) any justification to limit once again the right; 2) the constitutional reasonability of the scale of public wages and the “progressive limitation” to the indexation; and 3) the relevance of the economic situation to limit the right. Second, Law 796/03 was legally relevant, because it expressed the intention of the legislator, but the limitation of the right to wage indexation was not justified. Contrary to C1064/01, the reduction of the fiscal deficit to reach the macroeconomic equilibrium is constitutional and necessary “because the constitutional doctrine recognized it as a public interest”. 2) The limitation of the right is a “legal way to reach the objectives of the government”. However the Court gave a temporal limit (4 years) to completely update public wages. The precedent of C1064/01 was modified because of the absence of a clear legal parameter, the lack of argumentation to justify the measure, the context and the lack of competence of the Court to value the concrete implications of defining a specific limit to wage indexation and to justify the limitation. The Court defined a criterion of “justice and equity”: “the just middle”. For 2003, 50% of the past inflation rate was the limit to respect the principle of proportionality. “The savings obtained” did not have to be appropriated in these years but social expenditure had to be made sustainable in a context of fiscal deficit. Workers had to receive full indexation progressively before the end of each national development plan (four presidential years) until getting the 100% of the indexation. This is not a duty of the state but a fiscal saving to make social expenditure sustainable and this interpretation had to be a goal of public policies. Striking down the statute or conditioning its conditionality would obstruct the budgetary execution. It orders to: i) the legislator to establish flexible guidelines for wage indexation according to the macroeconomic objectives; 2) The National Development Plan to include in its general part how wage indexation is included in the macroeconomic policy; iii) the government to allocate enough resources to cover wage indexation, and “if necessary” iv) a transitory limitation under the “constitutional extremes” should be justified. These parameters were obligatory for wage policies.</p>	
C931/04	<p>Ministry of Finance - Macroeconomic assumptions sought a budgetary congruence with i) the goals of fiscal deficit approved by monetary authorities (CONPES and CONFIS), ii) the available</p>	<p>- <i>Res judicata</i> did not exist in ABL analysis. The voting results of the referendum were a new fact. - To protect legal certainty, confidence and equality it respected precedents (C815/99, C1433/00, C1064/01 and C1017/03) “in the context of the legal and factual circumstances”. - The macroeconomic variables and fiscal policy were not evaluated but only whether the limitation of the right was reasonable in the factual and temporal context.</p>	<p>Dissenting votes were the same as in C1017/03.</p>

	<p>levels of functioning, and iii) the accomplishment of priority duties of social expenditure, the recovery of economic growth and employment.</p> <p>- The OBL and the P.C. order: i) Budgetary obligations should be in accordance with fiscal (available resources) and constitutional (rule of law of the budget) conditions; ii) wage freeze above two minimum wages did not violate international treaties (C551/03), iii) the equality is real and effective and not mathematic (case law). This right is not absolute.</p> <p>- Macroeconomic issues that justified Law 848/03: i) macroeconomic stability and fiscal sustainability: the “most important collective patrimony of any society”. They seek to promote investment, economic growth, employment, redistributive expenditure and fundamental rights. ii) Public debt increased to close to 52% of GDP. iii) Public employees have had higher increases than the private sector. Those increases must depend also on productivity and responsibility.</p> <p>- The government complied with C1017/03; the right was limited to enlarge social expenditure.</p>	<p>-The charge based on the legal effects of the abstention was rejected because it lacked a “normative constitutional basis”.</p> <p>- Legislative antecedents of Law 848/03 were the text to which the strict test of reasonability was applied. The justifications of the limitation were the fiscal problems and macroeconomic goals. These antecedents sought to “identify potential additional justifications of the limitation (...) to public wage indexation”. These justifications (from precedents) did not pass the test because the need, proportionality and reasonability of the limitation were not proved and because it did not analyze the cumulated incidence of former restrictions and the differential effect of wage scales. They were abstract justifications that impede the balancing of the limitation vis-à-vis relevant constitutional benefits.</p> <p>-The test of reasonability: i) the objective of the limitation: the reduction of the fiscal deficit and the public debt. It was necessary and constitutionally valid according to precedents. The necessary constitutional goal of preserving the macroeconomic stability is the protection of public expenditure. ii) The means: wage freeze, which was neither proportional nor progressive and unconstitutional. iii) The relation between means and goals: the justifications had an economic nature and not a constitutional one.</p> <p>-The Court cannot replace the authorities in the argumentative duty. The constitutionality was conditioned to the respect of C1017/03 but considering the “particular” legal context.</p> <p>-In ABL for 2005, the limit of 50% would be unconstitutional because of the cumulated effect of the limitation, and the end of the National Development Plan (4 years).</p> <p>-This is not a debt for the state to be paid retroactively, but it omitted that savings should be spent on social expenditures</p>	
<p>C551/03</p>	<p>The President:</p> <p>-Citizens are sovereign to reform the P.C.</p> <p>- International treaties that form a constitutional bloc cannot be a “perpetual pact” that obstructs their will.</p> <p>-ILO Conventions can be denounced. The transaction in trade unions evolves.</p>	<p>-Systematic interpretation: The referendum is constitutional because the P.C. referred to derogatory referendums of a law and not to constitutional reforms.</p> <p>- The lack of technique is recognized but it is not a synonym of unconstitutionality.</p> <p>- The inclusion of those issues in a constitutional reform was necessary because they were contrary to C1064/01.</p> <p>- ILO conventions: arguments based on ICCSER and the Pact of San Salvador were rejected because it was a formal control of constitutionality which excluded a material analysis. But it did not violate those treaties, because it referred only to high pensions. ICSCER (7) and the San Salvador Pact (7) established the duty for the states to warrant wages that assure</p>	<p>Two D.V. The suspension of constitutional rules of the Legal Social State is unconstitutional.</p> <p>-The reform was suggested by the IMF; there are other ways to protect the Legal Social State than constitutionalizing</p>

		a dignified life. - ILO Conventions protect minimum wages, but none of them forbid that in times of crisis wages may be temporarily frozen under the principle of proportionality. - Arguments on the erratic policies of adjustment should be analyzed in a judicial review action against statutes but not against a constitutional reform where arguments of convenience did not proceed. -The reform limits rights but does not substitute the P.C. It is constitutional.	conjunctural policies. - Law 4/92 should have been applied to solve those problems, but the purpose was to elude the P.C. and international legal order as ILO Conventions.
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6.5.2.3 Some general comments on the judicial review case law on wage indexation

In general, these rulings are particularly extensive, with an important amount of repetitions, on the one hand, and with a clear lack of development of the relevant arguments on which they base their decisions, on the other hand. Those repetitions complicated the development of the central issue of the challenge. The preceding analysis was highly time-consuming, but allowed the identification of the main trends in the Constitutional Court legal reasoning.

The Court justified its “activism” by referring to the non-accomplishment of the government and the Congress with the enactment (regulation) of the Labor Statute (53 P.C.). It ignored statutes in force and applicable to the case (annual public wage indexation), and established instead new rules to define and adjust public wages. These rules are more vague and confusing than the parameters of Law 4/92. Although it was enacted under the P.C., the Court qualified it as non applicable because it did not develop labor rights of the P.C. (53). It rejected the criteria to establish public wages of Law 4/92 but paradoxically, when the wage indexation of high-level employees (Congressmen, Justices, etc.) was questioned, it rejected the challenge because this statute was not challenged and therefore those employees could not be included in these restrictive measures. More surprising, in 2003, the Court increased its own wages by declaring the partial unconstitutionality of Law 4/92 (C681/03) without a minimal reference to this debate.

The rulings analyzing the annual budget law were based on the violation of the P.C., not by a law but by the intention of the government, expressed in the presentation of the bill of the annual budget law to the Congress. This is not a legal act that can be challenged by judicial review (241 P.C.). The Court sometimes unduly applied the P.C. (187 and 363⁴⁵²) and it ignored more pertinent rules (215 P.C.), despite the

⁴⁵² The tax principle of progressiveness was used in the case of wage indexation rather as a regression, i.e. in the opposite sense as used in the P.C. for tax regulations.

emphasis on the economic context. Another example of unduly application of the P.C. was the reference to the National Development Plan (339 P.C.) because the general part of the plan is not a legal document, but a declaration of intentions of the government. The investment plan (which is the law of development) does not refer to current expenditures, but to investment projects and plans to be developed by the state and concretized in the annual budget law.

The historical development of the Legal Social State was quoted in excess but the Court omitted the analysis of the economic implications of wage indexation (only a dissenting vote of C1433/00 presented briefly part of the topic and the Public Ministry referred also briefly to the adjustment of credits and prices other than wages). In the economic analysis, the Court confused wage indexation with wage increase. It ignored the scope of the term indexation (not employed by the Court) understood as the protection of the purchasing power of salaries. This way, it argued in some cases that the non-indexation of wages did not worsen wages but improved them, because they were always increased, although not in the same proportion as the inflation rate (C1064/01). On other occasions, it admitted the limitation and even the violation of the right to wage indexation. In fact, C1017/03, as opposed to C1064/01 recognized also that the non-indexation diminished the real value of wages that worsen labor conditions, prohibited by the P.C. Notwithstanding, the Court accepted the limitation.

The Court argued that rights cannot be “absolute” and suggested that a generalized indexation was an “absolute right”, and therefore its balancing appeared as necessary, but this procedure was not clear. The term “Legal Social State” was used to justify any argument, mainly policy arguments. However, the Court created a new argument in the “balancing process”: the need to protect social expenditure allocations. The Court qualified the right to wage indexation as an ESC right, but it authorized its limitation to protect social expenditures. This argument or “goal of the statute” and therefore the conflict to be balanced, between wage indexation and social expenditure, was not presented by the government, the Congress or the challenge because the objective of the measure was the structural adjustment, whose scope and characteristics were ignored in the arguments of the Court. In fact, the Legal Social State was not the main issue of the challenges because with a public debt superior to 50% it was at least illusory to define how to appropriate resources for social expenditures. The argumentation used by the Court allowed using the same argument in an opposite sense as occurred in C1064/01, which quoted C427/96, and a dissenting vote explained that its real meaning was just the opposite.

In some cases, the Court sustained that the argumentative burden of the government to limit the right to wage indexation is strict, but afterwards, it did the job for the government, and the inactivity of the government did not have any legal consequence. In some rulings the Court affirmed that it cannot replace the government in the argumentative duty but in the next paragraph it developed an extended argumentation to justify the economic adjustment (which was in turn rejected in C1064/01 as constitutionally relevant). The justification of the limitation of the right to wage indexation was based on the need to allocate budgetary resources to priority objectives of social expenditure.⁴⁵³ But in C1017/03, as opposed to C1064/01, the Court accepted as a reasonable goal, the control of the fiscal deficit and debt. Curiously, it defended the respect for precedents, despite the contrary evidence. C931/04 accepted also the objectives of the law (the control of the fiscal deficit) as a valid goal because “the precedents accepted it”, although, as explained, this was not the case. In addition, the macroeconomic data presented by the government are accepted as a real fact and not as affirmations to be proved. C848/04 again ignored the role of the objective judge and played a highly activist role, although it did not benefit neither the adjustment, nor the workers. The Court pretended to create case law for each particular annual budget law as a form of a concrete judicial review (APFR)⁴⁵⁴, ignoring the abstract character of the judicial review. The “jurisprudential line” would thus be constructed by each justice depending on the arguments needed in each case. A typical example is the defense of the constitutional relevance of the macroeconomic equilibrium to justify the limitation of rights. C931/04 even mentioned a “consolidated” jurisprudential line, although there is no evidence about what “consolidated” means. C848/04 did not show a new legal reasoning but it largely cut and pasted past rulings. The law was not confronted with specific constitutional rules, because the challenge was based on “a legislative omission”, an argument rejected by the Court. The Court rejected the possibility of striking down the annual budget law because it would paralyze the whole state. It recognized that the rule that established the percentage of wage indexation is a governmental decree. However, instead of declaring its lack of competence (as the first reporting justice did in 2000) because those decrees should be challenged before the administrative jurisdiction, the Court ruled outside its constitutional possibilities, striking down the law or declaring its constitutionality.

⁴⁵³ The structure of the sentences was not coherent and in some cases even the numeration of the paragraphs was incorrect. It looked more as a cut and paste than as a real work of legal reasoning.

⁴⁵⁴ Because the constitutionality of the law was subject to the appreciation of particular circumstances, called the “factual and legal circumstances” by the Court, and not to the confrontation of the rule with the text of the P.C.

In the case of the referendum, Law 796/03 established the wage indexation and the Court ignored it. In this ruling, the Court recognized the lack of legal technique to draft the text of the referendum that would reform the P.C., particularly the inclusion of transitory fiscal policies in a constitutional reform. However, the Court accepted the text because it was opposed to 1064/01 and therefore the constitutional reform was necessary to implement these policies of wage freeze. C551/03 largely quoted irrelevant issues and central issues addressed by the challenge were not developed but decided (without arguments). The argument against the referendum affirming that the P.C. (170) prohibited derogatory referendums on laws referring to fiscal issues was rejected (*in limine*). The Court interpreted “systematically” the P.C. and concluded that the prohibition did not apply to constitutional reforms. This relevant issue was neither motivated, nor analyzed.⁴⁵⁵ Another example was the potential violation of international treaties on human rights ratified by Colombia. C551/03 rejected its analysis because it was a material and not a procedural question, but nevertheless, it justified the action of the government (approved by the Congress) in a General Comment (10/90) of the Covenant and accepted that in periods of adjustment it is valid to limit ESC rights. This argument ignored the main trends of this Comment which precisely sought to avoid regression in ESC rights for non-crucial reasons. The quotation was clearly used to its convenience but not trying to find a constitutional solution.⁴⁵⁶

The Court used as synonymous the terms ‘test of constitutionality’ and ‘test of reasonability’. Most of the analyzed laws did not “pass” this test but, notwithstanding, they were upheld. In some cases they were conditioned to the accomplishment of some orders whose obligatory character was not clear.

The adjudication of the Court on the annual increase of public wages illustrated how the interference of the Court was a constant concern for the IMF during the analyzed period of adjustment. One aspect is that the Court did not consider the existence of the Structural Adjustment Arrangements as a source of state compromises even if it accepted the existence of the Articles of the Agreement of the IMF as an international treaty (cf. C 057/2002). But another observation is that these rulings mostly defended the policies of the government and, in practice, they did not produce the negative consequences attributed in the IMF C.R. Paradoxically this impact is reached through the standard constitutional revision process, and not by the revision of the APFR as it was the case in the health sector. In turn, the government used those

⁴⁵⁵ In contrast, in other circumstances, its activism modified the text of the P.C. (187) to create a new criterion of wage adjustment, ignoring the existence of legal criteria (Law 4/92).

⁴⁵⁶ Cf. T760/08 on health issues, where issues of international rights were argued in the opposite way.

judicial review rulings as an excuse for the non-accomplishment of the macroeconomic goals of the IMF arrangements. Constitutional case law may interfere with public wage policy, sometimes substituting the Congress as regulator.⁴⁵⁷ However, what may be evident is that justices lack the institutional capacity to understand complex economic regulations and they use (or abuse) discretionary competences to regulate socio-economic sectors that sometimes produce effects contrary to their arguments (Alesina 2002, Amaya 2001, Carrasquilla 2001, Clavijo, 2001, 2004a, 2004b, Kugler M. and Rosenthal 2005, Lopez O. 2001a; 2001b).

Some of the critics to the Court, recognize however that part of the conflict could be solved if a better quality control of statutes is performed by the Congress and the executive themselves, to make the enforcement of public policies efficient and expedite, and to eliminate potential incentives to challenge laws (Amaya 2001:123-5). This recognition contrasts with the opinion of the IMF and the World Bank publications (see Guigale 2003 et al. Saez 2003), accusing the Court of being highly activist, producing “highly controversial decisions”.

Economic analyses do not always appear to be rigorous neither. Some criticisms against the Court mixed the positions of economists with the official position of the authorities (as is the case of Jaramillo and Ossa 2001:22 and Clavijo 2001). Curiously, they presented their economic approaches also as “universal principles”. The IMF did not present an objective and rigorous analysis of the institutional problems related to the potential role of the Court neither.

A last comment should be made concerning the reports provided by the Colombian Government on the progressive compliance with the duties of the ICESCR, in issues referring to the right to work (art.6). It mentioned legislative progress.⁴⁵⁸ And as relevant case law, it mentioned C325/00 which upheld Law 515/99 approving ILO Convention 138 and C567/00 that reiterated the concept of “constitutional corpus” and included ILO conventions 87 98 151 154 (E/C.12/COL/5: 2009: 55-6). In issues referring to the right to just and favorable conditions at work (art.7), the government mentioned as legislative development the development of the P.C. (53) by the Substantive Labor Code (143 and 13). It mentioned Law 789/02,

⁴⁵⁷ The Court ignored the competences of the government and the Congress but also the one of the administrative jurisdiction, which should have controlled the constitutionality and legality of the Decrees on wage adjustment.

⁴⁵⁸ These statutes were: the reform of the Code of Labor Procedure (Law 712/2001), the reform of the Labor Code, Law 789/02 (support of employment and the extension of social protection, and protection scheme for the unemployed), Law 909/2004 (regulating public employment, the civil service and the public administration), and Law 995 /05 (regulating holiday payments).

because of the benefits of the flexibilization of the labor schedule and Law 900/05 that reformed the composition of the Standing Committee on the coordination of wages and employment policy. But the most important issue referred to the developments in case law. Among other things⁴⁵⁹, it recognized that C1433/00 established the scope of the “real and effective increase in remuneration [which] should be in line with the inflation index and the actual social and economic factors affecting the determination of the increase and, in particular, the need to guarantee the subsistence minimum and the proportionality to the value of the performed work” (69). Concerning C1064/01, the government highlighted the establishment of criteria for defining “the minimum legal wage, the right to fair remuneration and the maintenance of the purchasing power” (E/C.12/COL/5: 68-9). Moreover, C815/99 was recognized, together with the control of the inflation by the Central Bank, as having a positive impact “on the recovery of real average wages” (E/C.12/COL/5:70).

The general observation applicable to the actions of all the actors here involved is the lack of a clear and rigorous methodology in their work. This obstructs the comprehension of their positions and the transparency of their actions. The efficient and legal compliance with the competences of each sector can sometimes be questioned. In addition, they use the regulations in force and the case law for its own convenience, depending on which international institution it is dealing with (the IMF or the ICESCR).

⁴⁵⁹ C535/02 which upheld Law 704/01 that approved ILO Convention 182 on child labor.

7 Findings of the research

This project analyzed the tensions between constitutional rulings (particularly but not exclusively referring to ESC rights) and policies of multilateral banks (particularly of the IMF), when the judiciary rules on economic reforms enacted under a structural adjustment program. The time frame of the analysis corresponds to the duration of the three arrangements signed by Colombia with the IMF: 1999-2006. The findings of the study are presented following the approach of Kinney and Clark (2004), taking the theoretical discussion as the point of departure. The empirical analysis of this project combined quantitative and qualitative methods. Jurimetric analysis was used to detect general patterns in the constitutional case law and in the IMF C.R. in particular policy areas and sought to obtain information that would complement the qualitative in-depth analysis.

The general objective of the project was the critical legal analysis of the interaction between the Colombian Constitutional Court case law and structural conditions presented as guidelines of legal reforms in the IMF structural adjustment arrangements agreed by Colombia during the period 12/1999 – 11/2006, with special reference to rulings referring to ESC rights. More concretely, the legal scope of the structural conditionality of the IMF supported programs, and the tensions between these arrangements and the constitutional case law deciding on these reforms were also analyzed. As far as the public policy incidence was concerned, detailed analyses were performed of the health sector and of the public sector restructuring and wage indexation. The cases were chosen considering their relevance from the perspective of the Court (in the case of health) and from the perspective of the IMF (in the case of public sector restructuring and wages). Although pensions and taxes were also relevant for the structural adjustment, the limitations of this thesis obliged to choose the most controversial sectors. Constitutional case law was analyzed following the scheme explained in chapter one, seeking to describe the legal reasoning of the Court rather than taking part in the discussion on the contents of the reform. Similarly an economic evaluation of the structural programs was not performed, but rather the interaction between the IMF arrangements and the constitutional case law was analyzed from a legal perspective.

The main variables considered throughout the analysis were: (i) the quantity and quality of constitutional rulings on structural reforms undertaken under the IMF Adjustment Arrangements; (ii) the normative character of IMF Arrangements; (iii) the institutional capacity of the Constitutional Court to rule over

structural reforms: judicial independence, judicial accountability and judicial activism; (iv) the relevance of ESC rights and constitutional principles in constitutional case law; (v) the incidence of IMF structural conditions on constitutional case law; (vi) the role of constitutional case law in IMF programs; and (vii) the impact on public policies of constitutional adjudication and of IMF arrangements. The interactions among these variables were the object of the specific objectives of this study, and were tackled with the help of the research questions.

7.1 Constitutional case law: competences, activism, quality

The first objective was the evaluation of the constitutional case law with respect to: (i) the institutional design: constitutional framework of constitutional case law; (ii) discretionary competences of the judiciary, and potential usurpation of political and legislative competences; (iii) judicial activism and judicial independence (political pressure, role of ideology); (iv) the quality of argumentation: theoretical basis, legal method, coherence, institutional capacity to analyze complex matters, the influence of foreign and international law systems in adjudication, and (v) and accountability of constitutional adjudication.

The research questions were the following:

- Is the active role of the Court a problem of auto-attribution of competences (judicial activism), or, is it related to the text of the Constitution itself? When judicial activism, judicial independence and discretionary competences of the judiciary are looked at, are there indications of usurpation of political and/or legislative competences?

The recognition of judicial discretion and the acceptance of the indetermination of the law, or not, are the distinguishing issues among legal schools. The degree of acceptability of judicial discretion is also different between Common law systems and Civil law systems, where the supremacy of the legislative is privileged. Constitutional case law output depends thus on the relevance of judicial discretion and its imposed limitations. Phenomena such as globalization, economic integration and the constitutional regulation of economic, budgetary and fundamental rights issues favor schools as Legal Pragmatism that defend a significant degree of judicial discretion, and empower the judiciary.

Judicial behavior is the core content of the positive approach to judicial discretion and judicial interpretation is seen as one of the most used ways to implicitly reform the Constitution (Voigt 1999a). Every branch may engage in implicit constitutional change, but judicial review gives an advantage to the judiciary. This positive analysis of courts seeks to fill gaps of constitutional theory mainly by avoiding strong moral influence on adjudication and by highlighting the relevance of the empirical knowledge of the judiciary, such as about judicial activism or workloads; i.e. consequences of constitutional case law are highly relevant (Posner 2004b). The empirical evaluation of judges usually involves ideology, which has not been demonstrated as the most important element to explain adjudication and judicial behavior (Cross 2006) but it seems that if ideology is an important component of judicial activism, judges are inclined to use implicit constitutional change (Voigt 1999b).

One important idea is that “judicial and legislative competence(s)” are also highly relevant in constitutional adjudication. “Legislative competence” is the capacity to understand the effects of laws and the possible effects of upholding rulings or striking down totally or partially statutes. The lack of this competence troubles the system and affects judicial review as an institution (Posner E. 2008). Judges with judicial competence do not necessarily have legislative competence and therefore, judicial activism may not be always convenient, and therefore judicial activism is mostly analyzed from the perspective of political theory (Posner 2004a). Judicial activism normally refers to rulings striking down laws based on constitutional values which may have a positive or negative connotation. Other forms of judicial activism are also recognized with contradictory connotations: (i) “judicial legislation” when in the presence of a declaratory of unconstitutionality the gaps in a statute are filled, which can be modified by legislators because it does not have the same enforcement as law. (ii) Reversing precedents, which is difficult to identify because it is possible that precedent was activist and the reversal tried to correct the situation; (iii) giving unnecessarily broad opinion not directly related with the decisions, that may usurp competences of other powers (e.g. opinions on public expenditure) (Cross and Lindquist 2006). In general, when the motivation of a ruling is not directly linked to a legal source or precedents, and it is based on reasons other than the law and judicial reasoning, and supported by arguments rather than proofs, it has a negative connotation (Aguiló 1997; Cross and Lindquist 2006; Posner and Landes 1976). “Remedial activism” also worries but it is justified because “if the law makes empty promises of justice and courts stand by -impotently watching constitutional violations persist without taking action to correct them- then we do not fulfill the promises of equal protection and due process” (Justice 2004).

Several methods were proposed to measure judicial activism, but the recommendation is focusing on “systematic tendencies of judicial activism”, rather than on judicial activism in individual decisions to avoid that the analysis becomes too dependent on subjective benchmarking on the side of the researcher. In addition, the monitoring of dissenting opinions is also recommended because unanimous decisions are supposed to indicate less activist behavior (Cross and Lindquist 2006).

Judicial independence has a positive connotation but it is seen as a way to promote judicial activism. By contrast, the normative schools of legal theory highlight as quality of judges their independence, impartiality and good qualifications to adjudicate. The design of safeguards is therefore recommended to guarantee the right to be judged according to the law and not under the influence of power relations or particular interests (Aguiló 1997). Judicial independence has been promoted worldwide by multilateral banks through judicial reforms, to improve the rule of law, growth (development) and fundamental rights; although these hypotheses are not globally shared. An empirical test of the relation between judicial independence and economic growth distinguished between de jure and de facto judicial independence (Feld and Voigt 2004). De facto judicial independence had a strong and statistically significant positive impact on economic growth, while de jure judicial independence did not have a similar impact. Colombia obtained the first place with respect to de jure judicial independence and an intermediate position with respect to de facto judicial independence (Hayo and Voigt 2003). Drawing general conclusions about the relations between de facto judicial independence and development level, type of legal system, political regime etc. is difficult because of the complexity to measure and conceptualize the variables involved. The recommendation is therefore, to analyze particular cases due to the huge amount of judicial dependencies and heterogeneous rulings.

In Latin America, Mexico and Colombia are presented as examples of countries where high courts are empowered as a way to consolidate democracy, being the agenda of the Colombian Constitutional Court more ambitious than the one of Mexico. Its judicial activism was not always negatively evaluated but rather considered as a crucial institution to push democratic transformations (Schor 2008b). However, rulings of some Latin-American Constitutional Courts, particularly on the justiciability of ESC rights based on a neo-constitutionalist approach, are accused of usurping legislative consequences which may politicize the justice, legislating without democratic representation and privileging personal preferences disguised as “pseudo-scientific postulates” (García A. 2007).

The constitutional regulation of the Constitutional Court did not provide particular “activist” competences. The main competence is the protection of the P.C., and it is expressly established that case law is not a source of law but an auxiliary criterion of interpretation. It was the law (L270/96 and D2067/91) which led to the integral control of the P.C. and the active protection of fundamental rights by asking the Court to perform the judicial review of statutes by taking into consideration the whole text of the P.C., particularly the rules referring to the fundamental rights. In addition, the ruling has a general obligatory character but not its motivations, as case law sometimes pretends.

Most of the opinions coincide that the increasing judicial activism of the Colombian Constitutional Court is based on the Neo-constitutionalism approach, trying to impose the doctrine of precedents to strengthen its competences of rule creation, and using as a parameter foreign doctrine, but also by giving a normative character to constitutional principles and by increasing the number of justiciable rights. The Colombian Court, qualified as the most notorious case of activism in Latin America is not unanimously qualified as the main contributor to the welfare of the country. Critics (mostly economists) have found an excessive use of judicial discretion by the Court, ruling more on the basis of arguments than on factual evidence, being an incentive for pressure groups to try to capture it (Palacios 2001b). However, this activism is justified by the omission of the other powers, the “crisis in representation and the weakness of the social movements and opposition parties” (Uprimny and García 2001).

The case law analysis performed in this thesis found effectively that the Colombian Court was highly active in the auto-attribution of competences to “legislate”, based mainly on the omissions of the legislator, or on the duty of protection of fundamental rights. Although, sometimes no legal emptiness existed (see APFR case law or wage indexation) and the Court did not necessarily protect fundamental rights (see wage indexation).

- Which of the two actions (judicial review or the APFR) was used by the Court to play a more activist role and which of them has had more influence on public policies? Does the Court argue differently in each of them? In which action was the socio-economic context presented by the government accepted as a valid argument and in which one has the Court stucked to its ideology (Cepeda 2004b)? Did the Court defend “its ideology” without considering the possible economic consequences of those decisions?

As it was said before, the pertinence and convenience of judicial review has mainly been developed from the perspective of law and politics because it is direct linked with the policymaking role of courts. It is defended by certain normative approaches as the Dynamic Interpretation of the Law and Institutionalism, because the judiciary would have a “comparative advantage” vis-à-vis the legislative in determining the meaning of the constitution (Ginsburg T. 2004; Tushnet 2008b). Judicial review is also justified, to solve disputes “among multiple lawmakers”, avoiding usurpation of competences and to protect individual rights against the actions or omissions of the state. The democratic objection against judicial review is solved by the election of judges in accordance with the Constitution, i.e. they also represent a democratic power.

The case of Colombia corresponds to the model of ‘strong judicial review’, because the Court can avoid the application of a statute or modify their effects according to the regulation of individual rights (Waldron 2006). This model is defended when there is no discussion on a specific constitutional meaning. ‘Weak judicial review’ is recommended when “the possibility of a range of reasonable specifications of general abstract rights” is accepted, and the “comparative advantage” of the judiciary in interpreting the constitution “is relatively modest”. This model is therefore recommended when uncertainty exists about the clear meaning of a constitutional rule (Tushnet 2008b; Epstein 2006), as it is the case in Colombia. Courts are supposed to have the capacity to analyze moral concerns of rights, but they may distort the rights discourse due to their interest in developing their “own doctrines and precedents”. Disagreements on the scope of rights are very usual and the unanimous conclusion is that they should be solved by a political debate, avoiding the “interpretation in a narrow legalistic sense”. “Rights-based judicial review” is seen as democratically incorrect, because the problem is not the legislative capacities to regulate them but that citizens “disagree about rights”, which is not the same as rights being violated. The recommendation is therefore the preference of the legislative procedure with a participation of courts before the enactment because judicial review cannot solve institutional failures (Waldron 2006; Gargarella 1997; Friedman 2004). This view rejects also the unconstitutionality by omission, when other branches do not provide certain goods and services, because it may exceed judicial competences.

The statutes analyzed in this research show that, in general, judicial review case law accepted the socio-economic context presented by the government as a valid argument, and the discussions concerned mostly the scope of delegation of legislative competences, as occurred in the case law on health and on restructuring of the size of the state. Although judicial review case law on wage indexation was apparently

highly activist by the way of conditioned rulings ordering the government and the Congress additional budgetary appropriations, since 2001, they supported general public policies, but not always in accordance with the expectations of the government. They showed a considerable degree of variation and little respect for precedents. The activist use of judicial review is mainly justified by the defense of the constitutional control of economic policies by way of the reasonability test, because the objectives of a reform should respect the P.C. and the means should be “potentially adequate” to these purposes (Uprimny and Rodríguez 2006).

In Colombia, the APFR has been attributed more democratic relevance than abstract judicial review, because it has created a sort of culture of rights, placing case law at the center of the political debate (Schor 2008b). This is seen as a displacement of legislators as main guardians of rights and a shift in the method of adjudication, displacing Legal Formalism by the balancing method of the Neo-constitutionalist approach. From the empirical analysis of the APFR in this thesis, the following findings can be extracted:

Health APFR has been growing in importance, particularly since 2004 when it represented more than 25% of the total Court case law. Since 2005, it exceeded judicial review case law. The percentage of APFR rulings revised by the Court dropped since 2002, but the part corresponding to cases of health provision shows the opposite behavior, growing continuously and exceeding 30% of the total APFR case law. The percentage of conceded rulings, ordering the protection of the right to health (i.e. the supply of a health service) is 71% on average, being especially relevant since 2004. Negative decisions are slightly diminishing, being the lowest in 2006: 18% on average. The probabilities of obtaining a favorable decision when the APFR is revised by the Court are growing over time, which might be one of the reasons for its over-use. The identification of the arguments used by the Court to concede or deny the APFR allowed determining how far the Court has gone as regulator in this sector, respecting or replacing general regulations. The categories that requested services without a legal entitlement amount to 53% of the total Court APFR case law. It ordered the non-application of legal rules and instead compelled the provision of the service based directly on the P.C., which amounts to a sort of subsidy. The correction of the administrative inefficiency in the sector by the use of this action appears small and did not show signs of improvement; cases in which the APFR was used to avoid arbitrariness and inefficiency of the health service providers represented 18% of the total number of APFR. They asked the compliance with contracts and regulations by private or public suppliers who deny health care and should indeed be addressed with

this instrument. Despite the fact that the legislator took some correctives (Law 972/05 that protects catastrophic illness) the APFR continue to be used more for non-critical cases in which the right to health is not easily connected to the right to life or human dignity, as the Court stated in its doctrine on justiciable rights, increasing the budgetary burden.

These conclusions are corroborated by another study that concluded that in fact, the use of APFR continued to grow in this sector because it appeared easier to obtain subsidies this way than by following the administrative procedures, especially for people in the contributive regime (Uprimny, 2007). Defenders of APFR insisted in its justiciability supported by the international law system, and its growth is interpreted as an evidence of the increasing violation of the right to health (Uprimny 2008; T860/07 and López 2008). Notwithstanding, they accept the empirical evidence that the APFR case law may have also increased inequity because in the presence of budgetary restrictions, the best way to warrant universal coverage of good quality is through a legal framework defining the scope of ESC rights and limiting discretionary competences of the Court. The legislator enacted Law 1122/07 to improve the system but nevertheless the Court showed increasing activism, even by way of judicial review (cf. C463/08 quoted by Procuraduría 2008 on the extension of incentives established for cases of high cost illnesses to all non POS-claims from both regimes). In addition, T760/08 ordered the regulators to take measures to eliminate the “regulation failures” of health programs (POS and POSS), to assure its precision, its integral updating, the unification of both regimes and the appropriate and efficient provision of the service by the EPS, taking into account the epidemiological profile and the financial sustainability. In conclusion, health APFR case law of the Court appears highly activist, giving pre-eminence to the constitutional rights and principles but judicial review case law on health issues has been more conservative and upheld the constitutionality, even by contradicting APFR case law (Procuraduría 2008:178).

APFR case law on wage indexation was the principal way to protect labor rights, and more concretely the protection of the purchasing power of the wages (SU995/99). The Court recognized that ILO conventions are compulsory because the P.C. (53) established that ratified international labor conventions are national legislation; supported also by case law on the vital minimum, it protected the right to wage indexation. However, it clarified that the P.C. (53) values minimum wages in a qualitative way, because the “minimum dignified conditions of life” are not the same as the subsistence minimum (Alvarez 2002). Before the analyzed period, the Court accepted that the non-annual wage indexation concedes the employer an

unconstitutional and “unjustified enrichment”, but in the period 2000-6, the use of the APFR was systematically rejected to demand the indexation of public wages, contrary to the judicial review case law on this issue and to APFR case law on the right to health. The most important ruling (SU1052/00) considered as precedent on this issue, highlighted the subsidiary character of APFR, i.e. it could not be used when other legal actions existed to protect the right. The Court refused the use of APFR to take abstract decisions of which the competence belongs to other branches of power because it would substitute the state in the formulation and application of fiscal policy, or in other public issues including the general direction of the economy. The Court recognized that this would be an extra-limitation of its own competences, unconstitutional and not pertinent, because the principle of separation of powers would be violated. The Court accepted that an indexation of wages higher than two minimum wages would violate the Organic Budget Law (OBL) and the P.C., due to the inclusion of expenditures in the annual budget law without the respective available resources. However, with respect to the annual wage increase for Congressmen and higher employees of the state, the Court refused the use of APFR to challenge those rules. From 2001 onwards, no more APFR rulings on public wage indexation were found in the Court case law, maybe because of the lack of challenges, or otherwise, because of the non-selection of these cases for revision provided the clear precedents. APFR did not have budgetary consequences in this sector, in clear contrast with the situation in the health sector.

The judicial activism in judicial review case law and its influence on public policies, as well as its argumentative patterns are developed in the following points.

- Are the concepts of rationality and sovereignty of the legislator used dogmatically in case law argumentation, or do they accept the assumption of the rational judge and does the balancing method therefore prevail? Is the influence of foreign case law and doctrine notorious and is there case law “transplant”? Does it enforce the institutional capacity of the Court or has it been used strategically?

Many institutions of today’s constitutional jurisdiction in Colombia are derived from the constitutional and legal regulations while other institutions are adopted by way of case law doctrine. Some of them facilitate judicial activism as those similar to the ones of foreign systems: from the US jurisdiction, the use of concurring and dissenting opinions, the participation of third persons in the process, the role of law clerks, the severability clause and the discretionary competences in case selection (APFR); from the German

model, the enforcement of constitutional rights, and in judicial review “the power to hold legislative omissions unconstitutional” arguing “a sheer interest in complying with the constitution” (Ginsburg T 2004; Tushnet 2008b).

It has been argued that judicial globalization is characterized by the predominance of the application of balancing tests by courts and by the mutual citation in human rights matters, called the “new *ius gentium* of human rights” (Grey 2003), and that it is caused by institutional innovations (structural adjustment, economic integration etc.). Human rights are the focus of this judicial globalization, as rules or as policies, even if they are not in the constitution, and they empower the judiciary (Kennedy 2006). The use of precedent and citations in judicial adjudication is thus a way to put in practice judicial empowerment (activism). Theoretical and empirical studies diverge on the binding character of precedents. Political science emphasizes judges’ ideology, whereas legal approaches emphasize the constraints of precedents. The huge amount of precedents produces easily conflicts among them, because more than one may be applicable to a concrete case, which increases their character of policy decision rather than of strict legal procedure (Abraham 1998). Although the “rules of relevance” seek an appropriate use of the precedent, its discretionary use is always possible, for example through the “distinguishing” skill (Lindquist and Cross 2005). It has been qualified as a technique, an art or a game because “what constitutes the ‘holding’ of an earlier case is not well defined and can be adjusted to suit the occasion” (Scalia 1998). The use of “legal principles derived from past decisions”, mainly defended by Dworkin, is not accepted unanimously because of its vagueness and indeterminacy due precisely to the continuing change in rulings (Alexander and Sherwin 2004). Moreover, in the US, the binding character of horizontal precedents in constitutional matters appears irrelevant, because the Congress has the competence to refuse judicial opinions (Shapiro 2008).

Another reading assumes that precedent constrains judicial behavior (Abramowicz and Stearns 2004); its binding force is seen as a positive influence on the consistency of the legal system and in the reduction of moral error (Alexander and Sherwin 2004). Precisely, the relative absence of precedents in Civil Law systems is seen as the reason why some legal areas have shown unstable legal practice despite that they promote the principle of legal certainty (Mattei 1988, quoted by Fon and Parisi 2004). Therefore, an informal structure of precedent is promoted in civil law countries, to improve legal certainty not reached through codification, to increase judicial productivity (management of caseloads), to reduce the vagueness

of statutes and general principles, and to decrease the number of disputes and legal costs (Fon and Parisi 2004; Schneider 2001).

Empirical studies found that precedents are mostly respected and that their use for personal preferences could not be demonstrated (Knight and Epstein 1996). Judicial behavior cannot only be explained by personal judicial preferences, because “the conformity with the profession”, the leisure time or workload, together with the asymmetrical information that judges have on the choices of colleagues may have a disciplining effect on the respect for precedents (Lindquist and Cross 2005; Harnay and Marciano 2004). Another relevant finding is that ‘ideological biases’ of the judiciary have been more notorious in areas such as civil rights and liberties but more discrete in areas as tax and securities (Choi and Gulati 2006).

In the US, foreign citation is seen as arbitrary, although it is common practice in new constitutional regimes. “Bottom up globalization” explains how the global circulation of interpretative paradigms among judicial systems creates new relations of interdependence, different from the traditional mechanisms of competences of the executive and the legislative (Lollini 2007). In Latin America foreign citation by courts is the general rule (Schor 2008a). Colombian and South African Constitutional Courts are examples of great receptivity of legal concepts developed in foreign countries (Herdegen 2006a.) An analysis found that the crisis of Legal Formalism is attributed partly to its incompatibility with globalization (García A. 1997). In fact, a dynamic interpretation is recommended over textualism that would ignore the nuances of the different legal systems and would impede the creation of a transnational jurisprudence (Eskridge 2002).

However, by far the most used method in constitutional adjudication is the balancing method proposed by the Neo-constitutionalist approach. This method is supposed to be “globalized” when national and international courts adjudicate in constitutional and human rights matters (Bomhoff 2008). It has been labeled as a “viral” phenomenon because it expands rapidly from one jurisdiction to another and on a worldwide scale (Sweet and Mathews 2008). Comparative law has been designing methods to analyze “the language of balancing – and proportionality (because it) has become a new lingua franca of courts and constitutional scholars around the world” (Bomhoff 2008). But the “ambiguities and dualities” in the terms impede to find “common terms of reference” also because of the great differences in context and institutions among countries (Bomhoff 2008). At the international level, the EU, the European Convention of Human Rights and the WTO frequently choose it as method of interpretation (Sweet and Mathews 2008).

The (European and North American) balancing method is considered to be “tropicalized” in Mexico and Colombia, by adjusting them to their countries and by adding new elements. The Colombian Court explicitly cited comparative law, particularly German and US doctrines, whereas the Mexican Court adopted the Colombian model without citing it expressly (Conesa 2008). In fact, the Colombian Court has been using the techniques of precedent analysis from foreign systems, without a coherent theoretical development. It is accused of using both the Common law system of precedents and the Civil Law system for its own convenience (Lopez, 2000). The binding character of case law was accepted by C037/96, based on a reconstruction of the concept of “constitutional doctrine” and the use of the equality principle of the P.C., based on the Spanish constitutional case law (López 2006b). C836/01 extended the *stare decisis* to other high courts, but other judicial opinions reject the binding force of precedent and respect the auxiliary character given by the P.C. Precisely, an empirical analysis of sentences of the three high courts showed that the legal basis for adjudication in the Constitutional Court was 17% whereas in the other two courts it was more than 75%. Conceptual citations are the preferred sources for the three courts (around 50%) (López 2006b).

Apparently, the use of the balancing method sought to diminish the influence of textualism, historicism and systematic interpretation, but it is not applied systematically because other traditional methods are still used, mostly by the other high courts (the Supreme Court of Justice and the Council of State) (López 2006b). A former justice of the Court criticized the way in which the balancing test has been applied, because the Court confused the European proportionality test with the American equality test, thus mixing the two systems (Araujo 2006). The use of this method was considered as arbitrary because it was not established in the P.C. and the Court lacks the competence to regulate this procedure. In addition, the use of the reasonability test was considered as a powerful tool to limit the legislation, to use discretionary competences and to implement “axiological” and legal “emptiness” (Araujo 2006). Another analysis in contrast found that the Colombian court applied the “reasonability test” seriously. It found that three types of tests can be distinguished in Colombian case law: “a European [test] (...) based on proportionality with equal intensity; an American test that distinguished different levels of intensity, and a combination of the two” which although it is a tropicalized model, is not seen as negative (Conesa 2008).

In Colombia, a study found that the most remarkable trend in citation of foreign doctrine is a “new version” of Kelsen’s theory and the “Latin American” version of the theories of Hart, Dworkin and Alexy. It found that most of Colombian authors, who play an important role in this reception, have been law clerks of the Constitutional Court, confirming the analysis performed in the US that law clerks are an important group with influence on case law (Abraham 1998; Posner 2004b). The study found that in the Constitutional Court some justices have shown a clear and coherent citation pattern whereas others have tried to combine some of these theories, making impossible to identify a clear tendency for the Court as a whole (López 2006). Another study in contrast affirmed that the academic background of justices allow them to follow the worldwide tendency of balancing, placing the Colombian Court in the Latin America vanguard of the justiciability of rights, “deepening the social basis of democracy” (Schor 2008b).

From the in-depth analysis of judicial review case law, some general patterns were identified. (i) The style (the size of the interventions, dissenting opinions and of Court reasoning, the number and form of citations, the use of footnotes etc.) and method used are a discretionary choice of the reporting justice, rather than a collegial decision and this variation muddles case law analysis. (ii) Rulings are very long; the over-use of quotations and literal transcriptions (not always relevant) as case law technique is remarkable. A systematic presentation of the arguments would lead to better texts. Concrete arguments supporting the decision were remarkably short compared to the size of the sentence and the large volume of general (vague) issues developed before analyzing the concrete case. Long sentences allow to be quoted practically in any sense, and even to support contradictory arguments. In addition, almost every constitutional rule is considered as a “principle” and they serve to argue in any direction, giving the impression of a large judicial discretion. In addition, any argument finds support in constitutional case law (not being a strict precedent), which is the main support of the legal reasoning to validate their arguments. A particular ruling may be quoted in different ways, either finding relevant case law or omitting it, depending on the argument and on the circumstances. (iii) The definition of a rule as reasonable and proportional is a discretionary decision of the Court; the use of this ‘formula’ is a common place in the arguments of the challenge, the interveners and the Court. The scope of this concept depends on the understanding of the reporting justice and the test of proportionality and reasonability is the way to conclude whether a rule is constitutional or not, although the test is not always performed as explained in the legal theory. The outcome depends mainly on whether the Court found a purpose of the law and whether it accept the discretionary competences of the legislative and shares the political or discretionary decisions of the

Congress. In this case, they were a sufficient justification for the reasonability and proportionality of the rule. When the Court identifies a purpose, not necessarily based on the P.C. or the law, the rule has high possibilities to be constitutional. (iv) The opinion of the Public Ministry is not binding for the Court and it does not seem to have a high impact on the rulings. Some justices give it more relevance than others, who only mention its conclusions.

Judicial review rulings of the health sector were analyzed by identifying the legal arguments used by the Court to adjudicate. Using the classification of legal arguments presented in chapter 1, the following results were found: Rulings analyzing Law 617/00 (fiscal adjustment at the territorial level) used widely arguments of judicial authority, mainly constitutional case law evolution on the general issues of the statute. Precedents were also used. Legislative authority arguments were also relevant. The purpose of the law was identified with the legislative intention always found in the antecedents (exposition of motivations). The purpose was in some cases found in the P.C. and textualism was also used, but with less frequency. However, 'arguments of congruence' ("policy arguments") (e.g. the social and constitutional goals of the institutions) and 'substantial reasons arguments' combined with 'systemic arguments' based on the "rule of law" (e.g. the rule was "too strict and not proportional") were the arguments that defined the final decision, using always, as a formula, 'reasonability and proportionality' as synonymous of constitutionality. The principle of "macroeconomic stability" had a remarkable relevance.

Rulings referring to Law 715/01 (organic law on resources and competences for health and education) used mainly arguments of judicial authority (constitutional case law evolution and respect for precedents) together with arguments of legislative authority (purpose of the statute, identified with the legislative will). Textualism was also highly used in this group of rulings (e.g. the appropriation of the annual budget law did not comply with the text of the PC) but it was not the most relevant method. Arguments of congruence (policy arguments) were again relevant. They were accepted by the use of the "empirical analysis" of the policies of the government, presented as proof (CONPES documents) or as legislative antecedent (exposition of motivations). The adjustment was accepted by the Court as the need (or proof) that justified the reform. Again the 'substantial reasons arguments' combined with 'systemic arguments' based on the rule of law defined mostly the decision. The vagueness of the delegation of legislative competences were the main reason of 'unreasonability and non proportionality' of the rules and therefore of their unconstitutionality, except on one occasion where a conditioning ruling was used to avoid striking down the

rule: the Court defined 'constitutional criteria' to avoid the vagueness of the delegation, ordering to apply them until a new specific rule would be enacted. International legal theory (mainly from Spain) and constitutional and legislative history were used by one reporting justice but they did not determine the decision. Some quotations of international sources were copied from quotations in other constitutional rulings.

Rulings referring to D1750/03 (the restructuring of health services delivered by the ISS) used arguments of legislative authority as legislative history and purposivism, identified with the legislative will. Textualism was also employed in a 'tactical way' (e.g. i) the drafting of the rule did not determine a modification of acquired rights because the modification of labor benefits was not specified or ii) the legislator defined 'rational and proportional' labor rights). Arguments of judicial authority were also highly relevant: constitutional case law evolution and the overruling of precedents. C314/04 rejected C579/96 (quoted by the IMF and CONPES) because it was not a sufficient criterion to justify the similarity of two institutions as the challenge claimed. The argument of C579/96 quoted in the challenge was "an incomplete comprehension of the legal nature of the entity" and concluded the contrary: this legal goal impedes to assimilate these institutions. C349/04 accepted as precedent C314/04 but ignored the argument of the government that these agreements (supposed collective bargains) had a political scope. C559/04 based its decision on previous rulings that defined the financial sustainability of the system as purpose of the reform, in harmony with constitutional principles of health service provision. Again the most relevant arguments to adjudicate were those of congruence (policy), sometimes confusing the legislative purpose with the purpose of the government, assuming that they sought the constitutional protection of rights and principles (e.g. the limitation to the right to collective bargains was accepted because of the 'practical and political difficulties' to negotiate them). The acceptance of governmental policies was again presented as the recognition of the "empirical analysis". Policy arguments were usually complemented with arguments of judicial authority, conditioning the constitutionality of the statute (the financial sustainability of the health sector) to the compliance with the APFR case law on the protection of health rights. This is also a sort of 'substantial reasons argument' as it was seeking the protection of expectations (as opposed to acquired rights) of workers based on the principle of 'good faith', supported by constitutional case law.

Rulings referring to the annual increase of public wages showed the following argumentative trends: (i) The Court justified its "activism" by referring to the non-accomplishment of the government and the Congress

with the regulation of the Labor Statute (53 P.C.). The statute in force (Law 4/92), applicable to the case, was ignored and replaced by “jurisprudential” rules to define public wage adjustment, because it was vague and did not develop the P.C. However, these jurisprudential rules are more vague and confusing than the parameters of the law, and varied from year to year. In exchange, when wage indexation of high-level employees was questioned, it rejected the challenge because Law 4/92 was not challenged and those employees could not be included in these restrictive measures. Later, C681/03 increased justice wages by declaring the partial unconstitutionality of Law 4/92 without referring to this debate. (ii) Challenges were based on “a legislative omission” of the annual budget law (A.B.L.) because it did not appropriate enough resources to indexate public wages, but the Court rejected the charge. Rulings were based on the violation of the P.C., not by the A.B.L. but by the intention of the government, expressed in the presentation of the bill to the Congress. This is not a legal act that can be challenged by the judicial review (241 P.C.). (iii) Since 2001, the possibility of striking down the statutes (A.B.L.) was rejected, because it would paralyze the whole state and used orders to allocate additional resources. The Court recognized the competence of the government to establish the percentage of wage indexation but nevertheless, it ruled beyond its constitutional attributions. (iv) The historical and constitutional case law development of the “Legal Social State” was quoted in excess; this term was used to justify any argument, but mainly policy (congruence) arguments. (v) The Court did not analyze the economic implications of wage indexation (only a D.V. of C1433/00 and the Public Ministry referred to the issue) and confused (probably intentionally) wage indexation with wage increase. This way, sometimes it argued that the non-indexation did not worsen wages but improved them, because they were always increased, although not in the same proportion as the inflation rate (C1064/01). On other occasions, it admitted the limitation and even the violation of the right to wage indexation, because rights cannot be “absolute”, suggesting that a generalized indexation was an “absolute right”, and therefore balancing was necessary. (v) The Court imposed a strict argumentative burden on the government to limit the right to wage indexation, but the government did not comply with the duty and this did not have any legal consequence; the Court even realized an extensive argumentation to justify the economic adjustment (rejected in C1064/01 as constitutionally relevant). However, the Court did not accept all the objectives of the adjustment (mainly the control of the fiscal deficit) but justified the limitation of the right to wage indexation by the need to allocate budgetary resources to objectives of social expenditure. C1017/03 and C931/04, contrary to C1064/01, accepted the control of the fiscal deficit and the debt as a reasonable goal of the A.B.L., because “it has to respect precedents”. (vi) From 2001 onwards, the macroeconomic data presented by the government were accepted as a real fact omitting the duty of

being proved (arguments of congruence). In addition, it developed a sort of concrete judicial review case law for the A.B.L. because the particular factual circumstances had to be considered and therefore, the analysis of constitutionality had not to be exclusively performed on the basis of the P.C. This “jurisprudential line” (or precedent) was constructed by each justice depending on the needs or the argumentation in each case, as occurred with the constitutional relevance of the macroeconomic equilibrium to justify the limitation of rights, which changed from year to year. C931/04 mentioned however the existence of a “consolidated” jurisprudential line.

In 2000, the Court used mainly ‘substantial reasons arguments’ to order the general indexation of public wages, because the macro-economic criterion was not reasonable and violated the principle of equality and constitutional labor rights. From 2001 onwards, the Court overruled this precedent with arguments of congruence (policy) (e.g. A.B.L. is different each year) combined with arguments of judicial authority (res judicata does not refer to legislative omissions) and textualism (e.g. the duty of indexation is not included in the P.C. and Law 617/00 limited public wage increase, up to 90% of the inflation rate). The support to the fiscal adjustment was presented, based on purposivism and constitutional history, and defended a “systematic interpretation”; the latter was in reality a ‘substantial reasons argument’ based on the goals of the Legal Social State, in international treaties and in arguments of judicial authority (constitutional case law and overruling of precedents) to recognize the macroeconomic goals as a ‘constitutional value’. Adjudication was mainly based on arguments of congruence (policy), applying the test of proportionality and reasonability which depends on the economic context. The Court used an argument of judicial authority (severability clause) and applied unduly the P.C. (187, 339 and 363), ignoring more pertinent rules (215 P.C.) to regulate public wage adjustment. In addition, it ordered the government to allocate fiscal savings obtained from the limitation of the right to wage indexation to social expenditure. This was based on substantial reasons arguments (the absence of a planning law, the principles of solidarity and material equity, and the conditioned constitutionality of macroeconomic constraints to the argumentation presented by the government). In 2003, the Court reiterated this precedent but, using ‘substantial reasons arguments’ supported in constitutional case law, it tried to constrain the competence of the government to limit the right to wage indexation. This was justified by “the silence of the legislator and the prudence of the judiciary”. Despite that the government did not justify the limitation of the right, the Court applied the test of reasonability and proportionality (strict test of constitutionality) to arguments developed by itself. Using arguments of congruence (e.g. fiscal deficit and debt were notorious facts that had a constitutional value or

the continuous loss of purchasing power of wages), the Court upheld the reduction of the fiscal deficit to reach the macroeconomic equilibrium. Using the argument of judicial authority (severability clause) the Court modified C1064/01, recognized as precedent, establishing a new formula to adjust public wages, based on the 'just middle'. By means of a conditioning ruling, it ordered that the government should realize the complete wage indexation at the end of every governmental period which coincides with the term of the National Development Plan; however, this was not considered as a debt for the State, but as a saving to be allocated to social expenditure. In 2004, the Court reiterated the same method of adjudication using mainly arguments of judicial authority (constitutional case law, precedents) and arguments of congruence (e.g. the constitutional value of macroeconomic goals) and reiterated the lack of justification of the government to limit the right to wage indexation but nevertheless it applied again the test of reasonability and proportionality (strict test of constitutionality) to its own analysis. The Court concluded that the justification was of an economic nature and not of a constitutional one. Using again a conditioning ruling, it ordered that the government should realize the complete wage indexation at the end of every governmental period which coincides with the term of the National Development Plan. It reiterated that this amount did not constitute a debt for the State, but it did not order to allocate the resources to social expenditure.

Finally, C551/03 (referendum) supported the policies of the government (based on IMF recommendations). The Court rejected the charges based on the textual reading of the P.C. (170) ("context meaning arguments") and instead it applied "the systematic interpretation" and arguments of legislative authority (e.g. the lack of technique was not seen a synonym of unconstitutionality) and of judicial authority based on the binding character of precedents (e.g. the constitutional reform was justified by its incompatibility with C1064/01). Finally, arguments of congruence were again privileged; the violation of ILO conventions, the ICESCR and the Pact of San Salvador was rejected because a formal control of constitutionality excludes a material analysis. However, using as fundament a partial reading of the General Comment 3/90 of the UN Human Rights Committee, it concluded that the reforms did not violate those treaties, because none of these conventions forbade that in times of crisis wages may be temporarily frozen under the principle of proportionality. It added that under adjustment programs those rights may be restricted and even turned back if the states present the need and proportionality of the measure and thereby protect vulnerable sectors.

As it was shown, the activism of the Court is more than evident. The citation of foreign doctrine is not systematic and neither is it the main source of its rulings. On the contrary, the use of its own constitutional case law to justify its decision is notorious. The 'ideology' of the Court cannot clearly be deducted. However, the activism was not used against public policies, on the contrary, the support to the structural adjustment of the government was almost permanent, with some exceptions that were mostly later reevaluated. In general, the economic policies of the government were not discussed and instead, they were seen as a demonstrated fact. However, nor the government, nor the Court expressly mentioned the presence of IMF conditionality in the design of these reforms.

- How is consensus reached inside the Constitutional Court, and which are the features and trends of dissenting or concurring votes?

Ideology has been mentioned as important in the presentation of dissenting opinions, because they show disagreement in the voting and the writing. Against dissenting opinions pleads the potential waste of work; however, they have also been identified as a form of weakening the binding force of the ruling as precedent. And they have also been identified as a measure of judicial independence, although the reasons behind the dissenting opinions may also be related to caprice or "unwillingness to compromise" (Choi and Gulati 2005). An empirical analysis showed that "the greater the number and length of a court's majority opinions, and the fewer the number of footnotes and of dissenting opinions, the greater will be the number of citations to that court by other courts". It also found that dissenting opinion affects the majority opinion when concrete censures are presented that would better "pass over silence" (Posner 2000). Another study show that the political affiliation of judges matters and that citation bias tends to increase in the presence of a dissenting opinion, particularly from the opposite party. When there is citation bias, judges tend to "cite disproportionately those judges that cite them the most", which is mostly done by judges not belonging to the best universities (Choi and Gulati 2006).

A contrasting case is the French case because there are no dissenting or concurring votes, and the author of the opinion of the Court is not identified. The "judicial development of the law" is reached through the "rapport" and the "conclusion" but not in the ruling itself (Popkin 2002). This is also the case of the European Court of Justice that does not record individual votes, neither publish it the dissenting opinions. This way, individual justices can hardly influence the output of the Court (Voigt 1999b).

In the Colombian constitutional case law analyzed in this thesis, unanimous sentences were the majority (76%). In the health sector, they reached (86%) of the total number of sentences, followed by the transparency of the public sector (84%) and the fiscal revenue (82%); in the latter sector, this high level of unanimity is remarkable, considering that this sector counted the most challenged statutes. The most controversial sector in the decision making process of the Court was the intervention in the private sector (systemic reforms and labor market reform), but unanimous rulings were still the majority (57%). The more controversial rulings were these that adjudicated on the labor market flexibilization. The scores of unanimity in sectors related to ESC rights were remarkably high (pensions 77%, and health 86%) whereas they were responsible for a big part of the APFR case law, which provoked vivid controversies in the public opinion.

The case study analysis of both sectors (health and restructuring and wage indexation in the public sector) does not reveal conclusive patterns, although almost all justices have at least once presented a dissenting opinion. The public choice analysis of justice's behavior and ideology in presenting dissenting votes goes beyond this research. However, some patterns of ideology or behavior are easily identified among the justices. For instance, some of them usually present dissenting opinions to argue the supremacy of the Legal Social State; others focus more on legal issues as legislative technique or argumentative quality, but further analysis should be performed to reach solid conclusions.

- Is it possible to limit the interpretative method used by the Court to avoid arbitrariness, particularly when it argues that the effectiveness of rights and constitutional principles lead to striking down or conditioning economic reforms? Can objective criteria be designed to limit the competences of the Court with respect to constitutional interpretation, particularly when its own competences are to be interpreted (Palacios 2001b)? Is the Court independent, impartial and accountable?

Judicial accountability seeks to make judges impartial and to avoid unchecked decisional independence and other judicial conducts beyond their competences. One way to reach judicial accountability is through inter-branch dialogue which seeks a balance between "judicial authority and democratic accountability" (Popkin 2002). This is also the perspective of the Dynamic judicial interpretation which defends judicial activism but with a high degree of "accountability, representation and responsiveness" (Schacter 2002; Burbank 2006). This refers also to the optimal levels of judicial independence (understood as discretion)

vis-à-vis other branches. Public Choice explained that the guarantee of judicial independence depends on the ideal selection of judges, being the best option their election by the legislative, with the “optimal voting rule” (unanimity), although self-election by the judiciary is an incentive to appoint the best (Mueller 1999).

Judicial “self-restraint”, together with “the habit of obeying judicial judgments” by the other powers and respect precedents, is another proposed way to guarantee judicial independence, “inter-branch equality” and the rule of law (Edwards 2001; Wallace 2004). This position respects discretionary competences of the legislative, particularly in social policies; the judiciary should “look for ways to up-hold legislation rather than to strike it down”, because it would be better “for the majority to make a mistaken policy decision, within broad limits, than for a judge to make the correct one”, and hence, procedure is more important than decisions (Wallace 2004; Contini and Mohr 2007).

In contrast, positive analysis of the judiciary argues that Courts seek to define their own competences to obtain more power than granted by the Constitution through implicit constitutional change and by the extension of the scope of some rights not expressly regulated in the Constitution. The options of the other powers are the reform of rulings or the reform of courts (Voigt 1999b). The hypothesis that adjudication mostly respects the law and that it is constrained by interpretative methods is attacked because one particular method of interpretation can lead to different possible answers and it can be freely chosen by justices. The freedom of “methodological choice” is therefore seen as a way to favor judicial “political biases”, although it was also accepted that its evaluation is difficult (Volkh 2008). The discretionary choice of the method and the adjustment of the parameters of interpretation to the context matters in the control of constitutional case law. In this area, rulings can hardly be classified as wrong or right from the perspective of the law. It is possible to express agreement or disagreement with them; in addition, they have a never ending character (Posner 2005b).

Some parameters to define adequate judiciary behavior were proposed. They recommend (i) the use of “accepted interpretative methodology”, to avoid distortions of the text seeking personal goals; (ii) the respect of precedents; (iii) the respect of external principles of the law and not internal opinions of the judiciary (Cross and Lindquist, 2006). Other parameters to evaluate the position of the ruling vis-à-vis the “correct decision” take into account ideology and the “strength of case” but they are hardly applicable to the national context. Another way to control judicial discretion is through collegiality that favors principled

agreement, taking all the visions into account. It may neutralize “the role of partisan politics and personal ideology”; however, the output of collective decisions depends on their organizational rules (e.g. voting rules) and therefore inconsistent collective decisions cannot be completely avoided (Edwards, 2003).

In Colombia, the lack of control over constitutional adjudication is one explanation of its discretionary use by justices, ignoring the constitutional regulation of judicial review and its lack of status as a source of law (Palacios 2001b; Kugler and Rosenthal 2005). This applies particularly to arguments on constitutional rights used to strike down a statute. However, the Statutory Law of Justice Administration (Law 270/96) developed the constitutional competences of the Court, ordering the judicial review of statutes on the basis of all articles of the P.C. The activism of the Court is thus promoted by the law, contrary to other systems where the use of general principles of justice, freedom, equality and morality to decide judicial review cases is not allowed (Ruiz 2000).

As in other countries, accountability is suggested through “the reserves of interpretation” inside and outside the Constitution, to limit the competences of the Court to adjudicate, particularly when the effectiveness of rights and principles leads to striking down or conditioning statutes. The risk is again that the regulation of judicial discretion may be interpreted in a discretionary way (Herdegen 2006b, Palacios 2001b). In fact, the Court struck down the limits imposed by the SLJA to their competences of adjudication (Cf. C037/96). The ‘reserves of interpretation’ basically proposed that issues concerning social interest should be a competence of the legislative as well as issues ordering budget allocations. In addition, rulings that condition the constitutionality of rules should be avoided because the Court lacks explicit constitutional competences; they are the result of the practice of other Constitutional Courts (Palacios 2001b; López 2000). Finally, the use of extra-constitutional parameters to limit constitutional adjudications as international law standards, comparative law, empirical parameters and the historical context of constitutional rules (Herdegen 2006a; 2006b) are precisely those that the Court uses to justify judicial discretion. From the analysis realized in this thesis, it could be suggested that another plausible option to control could be by avoiding discussions on fundamental rights in judicial review case law, given the existence of other constitutional actions to protect them in concrete cases (APFR, class actions and actions of compliance). In case a statute requires a specific constitutional control because of its relevance for fundamental rights, the P.C. (152) has already established that they have an *ex ante* constitutional review before its enactment.

The relationship between courts and public opinion seems to play a role for judicial accountability because higher levels of public support and transparency are supposed to lead to stronger courts (Vanberg, 2001). However, some studies also show that constitutional case law seeks to be aligned with public opinion and that courts act “strategically”. One study found that the judiciary tends to inform the public about decisions annulling public policies but less about decisions supporting them (Staton 2004). This reinforces the thesis of other analysis that found that the support of the public opinion and the weakness of other powers reinforce judicial activism because social movements reivindicade their causes (Restrepo E. 2002). The analysis of the treatment given by the press to the constitutional case law in Colombia showed that the protagonism of health and pensions is remarkable, mainly because of the results of the APFR case law.

- Is the justiciability of ESC rights by the Court in accordance with the parameters provided by international treaties, or do these rulings depend on the ideology of the Court? Does the Court extra-limit its competences when it takes up the role of legislator to correct the deficiencies of the law or to assure the effectiveness of rights?

Modern constitutions, enacted after 1945, generally protect ESC rights based on “a flexible and pragmatic” adjudication and enforcement following the German model (Grey 2003). Foreign constitutional doctrine is more important in fundamental rights issues and therefore, the globalization of constitutional law has been based on the expansion of human rights (Tushnet 2008c). One of the main issues is the definition of the core content of human dignity, denominated as “the vital minimum” or “survival kit” which is at the base of the justiciability of ESC rights in the German Constitutional Court and it has been “transplanted” worldwide (ICJ 2008:23-5).

Kinney and Clark (2004) found five types of constitutional provisions that address health care and that may be extended to other ESC rights. However, more relevant is that they found that: (i) 67.5% of Constitutions worldwide include provisions addressing health care. But many countries with the highest per capita government expenditures for health care do not necessarily have relevant constitutional rules. (ii) No correlation was found between the intensity of constitutional commitments and the average per capita government expenditures for health care; although the constitution is a source of protection. (iii) Legal remedies and the opportunity to challenge governmental failures to enforce constitutional rules vary among countries. They do not necessarily provide enough protection of individual rights nor are they the best

options to demand ESC rights. iv) Constitutional policy duties and international human rights treaties may be used as standards to evaluate governmental performance in the realization of the ESC rights. But even if the participation of courts in providing “solutions” for governmental failures in the enforcement of these rights may be a constitutional competence, budgetary restrictions determine their satisfactory realization.

Normative Public Choice recognized that ESC rights are not a unique set of rights worldwide because they have a cultural component. As a result, a constitutional regulation of ESC rights should: (i) eliminate “compulsory state–provided” redistribution, allowing citizens to contribute to private insurance programs. (ii) Approve tax and expenditures bills by large legislative majorities to avoid actions of interest groups. (iii) Assure that “the welfare increase of the subsidy recipient should be very large relative to the welfare loss of the taxpayer”. In poor countries, it recommended the establishment of short lists of entitlements because “each new entitlement increases the burden on the small portion of taxpayers that support this burden”. The degree of empathy among citizens is another relevant consideration (Mueller 1999). These parameters seek to solve the complexity of resources allocation to provide universal coverage of constitutional rights in developing countries, where rights discourse is politically important (Marmor, 2004).

At the international level, the justiciability of ESC rights seeks the enforcement of the obligations of the ICESCR (ICJ 2008). The International Commission of Jurists (ICJ) recommends the application of “legal standards, such as ‘reasonableness, ‘proportionality’, ‘adequacy’, ‘appropriateness’ or ‘progression’” in judicial adjudication on ESC rights, even for duties to fulfill, which also includes the parameters of “equality and non-discrimination”. The justiciability of ESC rights seeks to correct failures in the provision of rights by the State; this way, the use of judicial review is expected to verify whether the goals and means of the State justify specific measures, respect the constitution and international treaties on human rights, and take into account other constitutional goals (ICJ 2008). Judicial adjudication is therefore considered as having a double character, judicial and political, because it is competent to apply rules or principles to concrete cases but also to take discretionary decisions when it chooses a specific way of interpretation. In addition, the interaction among powers should be solved by “balancing” the issues at stake. Discretionary competences of the legislative and the executive are recognized but when these powers omit their duties of fulfillment of ESC rights, judicial ways to protect rights violation implemented worldwide and the flexibilization of these procedures seek to avoid violations of rights. Comparative experiences and regional case law to encourage judicial activism in the defense of ESC rights is therefore defended (ICJ 2008).

In Colombia, a highly debated institutional development in fundamental rights has precisely been the P.C. of 1991 which included 101 articles on constitutional rights; it is seen as a “highly ambitious social agenda that has helped brand the new Colombian State a social state of rights (...)” (Giugale et al. 2003). The law also regulated that the Court case law has to take into consideration the whole text of the P.C but particularly the rules concerning fundamental rights. As a result, the Constitutional Court ruled that the fundamental rights catalogue is open because the P.C. (93) sets out that international human rights treaties ratified by Congress prevail over national rules, but rights and guarantees “inherent to the human being not mentioned in them” (P.C. (94)) are also considered by the Court.

The Colombian Constitutional Court argued that the cost of protecting a right is not a reason to ignore constitutional rules concerning human dignity. The protection of ESC rights has been positioned by the Court as the corner stone of their reasoning; some of those rights have gained the status of fundamental rights and have been protected through the APFR case law (Cepeda 2004b). Some studies even affirm that this justiciability of ESC rights can even impose normative restrictions on economic policy (Uprimny and Rodríguez 2006). Economic discussions on the effects of constitutional case law protecting an ESC right are rejected with the argument that these discussions are not technical but political and that their theoretical framework depends on ideology and thus, the issue is not about who is right (Alviar 2009). However, public choice approaches reject the hypothesis that judges seek to realize the ideals of the Legal Social State because even Congress and government do not (Palacios 2001b).

It is clear that the Colombian constitutional case law that enforces ESC rights has followed international guidelines of the Covenant, in spite of internal criticisms also supported by international doctrine. Colombia is presented as an example of the justiciability of ESC rights worldwide. The periodical report of the Colombian government that monitors the compliance of the country (all powers included) with the duties of the Covenant in 2008, highlighted that the P.C. recognizes the regulatory character of the ICESCR. The report described the legislative developments of the general provisions of the Covenant, with the corresponding developments in case law. The government referred to constitutional case law as a ‘progress’ with respect to the compliance with the obligations of the ICESCR. When referring to labor rights, it quoted rulings that upheld some ILO Conventions, despite the fact that others did not do the same and upheld structural reforms (C551/03). Referring to the right to just and favorable conditions at work, the

government mentioned the legislative development of the P.C. (53) by the Substantive Labor Code, whose apparent lack of legislative development was used by the Constitutional Court to 'legislate' on the indexation of public wages. The government presented as particular advances, rulings highly criticized by them in the reports to the IMF. It recognized that C1433/00 established a "real and effective increase in remuneration (...) in line with inflation and with the actual social and economic factors" and that it "guarantee[d] the subsistence minimum and the proportionality with the value of the work performed". From C1064/01 the government highlighted the establishment of criteria for defining "the minimum legal wage, the right to fair remuneration and the maintenance of the purchasing power", in contrast with the legislative developments in force. C815/99 was presented together with the control of the inflation by the Central Bank as having a positive impact "on the recovery of real average wages". (E/C.12/COL/5:2009). These rulings were precisely presented in the IMF C.R. as the major distortions of the adjustment policies.

This shows that the evaluation on the compliance of a country with the fulfillment of ESC rights is also discretionary because it is mainly based on governmental reports, which, as it was presented, are highly subjective. The Court has not always enforced ESC rights neither. It seems highly committed to the protection of the right to health but in general, labor rights were sacrificed by the Court at the benefit of adjustment policies both through judicial review (since 2001) and APFR case law. It almost always found "rational and proportional" reasons that justified the limitation of these rights. In the case of the labor market reform, the Court accepted the limitation of acquired labor rights because the measures were clearly justified as being necessary to attack unemployment; it respected the decisions of the legislator because he has the backing of popular representation. It ruled that the justification of the convenience and need of the measure was "in abstracto" sufficient and that the evaluation of the reform would be performed in two years. In 2008, the law was challenged again because it did not produce the economic effects mentioned, but the Court rejected the challenge because it did not prove the absence of *res judicata* and rejected the bad results of the labor market reform in terms of fighting unemployment. In public wage indexation, although it accepted the limitation of the right, it limited also the competences of the government but with non-enforceable rules; it ordered a complete indexation of wages into the four years of government, but this indexation did not go to the employees but to the budget (social expenditure).

Political adjudication was justified to protect ESC rights, ignoring that another fundamental right is the impartiality of the judiciary to warrant just and impartial judgments. And as Kinney and Clark (2004) stated, the real constraint is budgetary capacity together with institutional transparency.

7.2 The normative character of IMF structural adjustment arrangements

The second specific objective of the thesis sought particularly to analyze (i) the constitutional and international regulation of the legal scope of IMF activities in the country, (ii) the scope of IMF structural conditionality. The research questions were:

- Is the State obliged to fulfill structural reforms established in the Structural Arrangements? Which national powers have to respect these regulatory policies? Is the judiciary constrained by IMF arrangements when analyzing the constitutionality of structural reforms?

The legal character of IMF arrangements has been extensively discussed. The absence of legal consequences in *stricto sensu* does not impede effects for the State, mostly in the international credit arena, because the non-accomplishment can be seen as a fault from an international law point of view. Conditionality seems to belong more to the legal framework of international economic relationships than to international law, because the economic perspective prevails (Sorel 1996). Normally lawyers prefer “hard law” whereas economists are more oriented towards “soft law” (Gold 1983) and conditionality is classified as “soft law”, being an intermediate point between the total absence of legal commitments and a formal legal agreement. This flexibility is also explained by the strong influence of the Common Law legal systems considered as the theoretical basis of this kind of international economic law (Sorel 1996).

IMF structural arrangements are not a foreign source of law, *stricto sensu*, because they do not have the status of international treaties. IMF conditionality is not unique in the international arena because international law has been producing different varieties of rules depending on their binding character, caused mainly by the creation of multiple international organizations. ESC rights are also presented as a case of standards that should be converted into binding rules at the national level, as occurred with ILO conventions. Soft law is qualified as a positive evolution of international law which creates “cooperative instruments” without specific sanctions (Riedel 1991). The States chose soft law mainly because it is more flexible and more “preliminary” (“less precedential and public”); it can be signed by entities that cannot sign

treaties and it should not be ratified by the legislative (Raustiala 2005; Riedel 1991). It is a way of governments to evade “domestic political pressures” and courts, and to regulate with less binding character although effectively influencing behavior. Their compliance seems more plausible when states are willing to cooperate, provided that there are no “authoritative interpreters” (Gersen and Posner 2008; Raustiala 2005). However, being the central concern of this thesis, it seems that judicial adjudication can be crucial for the enforcement of structural reforms and therefore it is recommended at least to inform the judiciary about the scope of these arrangements (Mohr 2007; Stiglitz 2002; Edwards 1992).

The IMF cannot enforce its recommendations, and therefore, it lacks relevance in countries that do not need financial support because compliance becomes a voluntary act and surveillance lacks a binding character for countries (Schäfer 2005). However, there are other types of coercion; a study found that countries belong to international organizations because they obtain benefits as increasing credibility, a major flux of investment or a lower country risk ratings, which is particularly relevant when domestic institutions are weak (Dreher and Voigt 2008). The IMF, in turn, has discretionary competences to distribute subsidized loans and to define the conditionality in each arrangement (Dreher and Vaubel 2004).

Conditionality of financial institutions is also seen as a way to impose the “efficiency reasoning in the law” and the concepts identified with the functioning of the IMF, as “soft law, default rules, social norms etc.” are considered as mechanisms seeking to minimize the role of the State as regulator (Mattei 2005b). The efficiency criterion is also criticized as policy because the decline of Law and Economics and its evolution towards Legal Pragmatism is ignored. The limitation of the role of the State and of the legal positivist perspective seeks to perform legal analysis “outside of local technicalities”, adaptable and applicable in different environments. But this kind of legal transplant of “obsolete legal ideas and conceptions” from Europe and/or the US is compared with the role that play imports of obsolete technology that favor dependency and depresses local innovation (Mattei 2005a). In practice, nevertheless, the excess of policy recommendations to reduce the role of the State (Peemans 2002; Schor 2006a) and the strong power of the IMF, whose conditionality attracts other sources of international financing, has been used as a model for other organizations to protect their resources (Sorel 1996; Garay 1999).

In Colombia, Structural Adjustment Arrangements were not used as a source of state obligations by the legislative nor by the Court, although it upheld the Articles of the Agreement as an international treaty

(C057/2002) and most of the judicial review case law accepted the motivations of the adjustment presented by the government as a reasonable justification of the reforms.

In fact, the volume of reforms enacted under the IMF arrangements seems not highly different from other years. Notwithstanding, another comparative analysis would be needed to confirm this appreciation. What results evident, as was explained in this thesis (cf. chapter three) is that policies suggested by the IMF have been generally adopted by Colombia since the eighties, without the implementation of specific adjustment arrangements. The pattern of the privatizations and the private law approach to development is clear. This may support the analysis that policy advice of the IMF is not less relevant than the conditionality of the arrangements (Dreher 2005b). But at the same time, it should be noticed that policy advice has not necessarily been implemented rigorously by Colombia during the period of the arrangements. In tax reforms, the country did not follow some of the more important recommendations of the IMF (FTT, VTA), nor in the case of public expenditure control (Budget Code, intergovernmental transfers). However, policy advice was frequent in the country in these sectors, but also for the modernization of the state and the restructuring of the financial sector.

- Which are the legal consequences of macroeconomic goals being totally or partially reached by other means and structural reforms not being completed? Is there any evidence that the arrangements are used by governments to impose their own unpopular policies?

The relation between structural adjustment and macroeconomic success has been mainly focused on growth and inflation (Crisp and Kelly, 1999). Some analyses found that those arrangements are instruments of the governments to impose unpopular policies, while others conclude that the IMF does not respect the sovereignty of countries to choose and implement their economic policies. Some analyses revealed that a country's willingness to reform is crucial for the accomplishment and that the conditions are the result of a bargaining process between the government and the IMF. As a result, governmental agendas seem more relevant than IMF policies and conditionality for the success of the program, because the reforms would be implemented even without the arrangements (Dreher 2003; 2005b). In fact, some economic results of IMF programs have also been questioned by quantitative studies showing no or even negative effects on economic growth in borrowing countries. Recent studies often found negative effects, especially in the short run, although other studies found positive effects in the long run (Bird 2007). The

average negative output effects were explained by the bad Latin American experiences (Hutchison and Noy 2003). Dreher (2005b) concluded that the IMF can influence growth via three channels: the loans disbursed, the conditionality and the policy advice. In the period (1970-2000) he found a net negative effect on growth. Compliance with conditionality did seem to have a positive effect on growth, but too small to compensate the negative effects of the other channels. Additionally, conditionality is not the main responsible because it is not generally fulfilled and it lacks an important impact on economic policies. It is more plausible that the potential “negative impact of IMF programs” can be caused by the “bad advice given by the IMF or the moral hazard that it induces to its borrowers” (Dreher and Vaubel 2004).

In general, the compliance with conditionality under IMF programs has been low; however, cancellations are not a direct consequence of non-compliance and new resources have been conceded even in the presence of failures. Strong commitment by the country makes conditionality unnecessary and, on the contrary, no commitment makes conditionality unhelpful (Dreher 2003; 2005b). The result is the prolonged use of IMF lending arrangements, justified by the ‘multi-stage’ nature of structural adjustment. Longer relations are of concern for IMF’s reputation (as creditor and as monitor) and apparently it lends more easily to assure certain results. This may be a strong reason to avoid punishment for non-compliance and can lead to a sequence of arrangements that produce unsatisfactory results (Marchesi and Sabani 2005). The variety of causes of failure or success of conditionality has complicated their identification, but often its excessive character is noted. It was also found that strong commitment by the country makes conditionality unnecessary and, on the contrary, that the absence of commitment makes conditionality unhelpful. As a result, the recommendation is to limit the role of the IMF to periodical and limited evaluations of the commitments, excluding specific policy measures. The shift of ex post conditionality to ex ante conditionality would increase the effectiveness of programs and their ownership (Marchesi and Sabani 2005; Dreher 2008).

The relevance of conditionality linked to the need to guarantee the reimbursement of credits is therefore contested by the “high failure rate of Fund Programs”, not impeding that countries that do not fully implement the program continue to pay their loans (Buirá 2003:8). An empirical analysis of the IMF showed that almost two thirds of structural benchmarks (that show the relevance of structural measures) focused on key sectors linked with macroeconomic stabilization and external adjustment (exchange rate and trade system and fiscal and financial sectors). Restructuring and privatization of public enterprises gained

importance but they were not necessarily critical for the accomplishment of the macroeconomic objectives. This means that other structural reforms in other non-mentioned sectors may have had the same weight. The accomplishment of these structural benchmarks and other measures listed in the LOI do not affect directly the approval of a program or the continuation of purchases, unless they disturb the completion of a review. Crucial structural benchmarks are relevant for a program's macroeconomic objectives. Other measures belong rather to the government's policy agenda, frequently included, as well as commitments with other institutions as the World Bank or regional banks. They are normally not critical for the program's macroeconomic objectives and despite the fact that the IMF has recommended its non-assessment in the program revision, because they increase the number of structural conditions per program, the IMF suggests that they can help to make program monitoring more detailed. A direct relation between conditionality and policy implementation is not clear; the results vary across countries and thus impede generalization. A prioritization of structural reforms, based on their importance for the macroeconomic goals, has been recognized by the IMF as useful but it also recognized that the definition of specific core areas remained difficult. Moreover, a detailed monitoring by means of "technical advice on implementation" can only be realized in the framework of conditionality (IMF 2001).

In Colombia, before the first IMF arrangement, growth was negative (-4.20 of the GDP in 1999) for the first year in decades. During the three years of the EFF arrangement (2000-2), growth rates were on average close to 2.5 % of GDP. During the two Stand-by arrangements (2003-6), the economic growth was increasing from 4.6 % of GDP in 2003 until 6.9 % of GDP in 2006, and reaching its maximum in 2007: 7.5 % of GDP. However, in 2008 it dropped to 2.4% of GDP and reached 0.4% of GDP in 2009. Thus, observing the years of the arrangements and the three consecutive years, a possible conclusion would seem to be that IMF arrangements have a positive effect in the short-term but a negative effect in the medium-term. However, these conclusions are obviously over-simplifying. The world crisis and other economic factors may have influenced growth more directly; it is therefore not evident to establish a causal relationship between arrangements and growth even more if, as it has been shown, conditionality is not compulsory, nor completely enforced. Further econometric work would be needed.

Considering inflation rates in Colombia, they showed a clear progressive decline starting even before the beginning of the arrangements with the IMF, when inflation was 9.2 % in 1999. In 2006 it was 4.5%, but in 2007 it increased until 5.7% and until 7.7 % in 2008. In 2009 it dropped again to 2%. Finding a direct

relation with the IMF conditionality is again not evident, because the declining trend started years before the beginning of the arrangements and it increased again after the conclusion of the third and last arrangement. Wage indexation cannot be made responsible for a specific trend in inflation and therefore it is difficult to draw strong conclusions.

Finally, considering fiscal deficit, the positive effects of IMF conditionality would appear to be clearer. The deficit diminished progressively until -0.4 % of GDP in 2006 and it was maintained until 2008. The reason may be that the control of public expenditure seems to be the main concern of the IMF periodical country reviews. In fact, budget management predominated in the IMF analysis, which focused on the control of the fiscal deficit and the design and implementation of the budgetary process. Notwithstanding, this last condition was not met.

Therefore, the legal consequences of non-completion of structural reforms, while the macroeconomic goals are totally or partially reached by other means, seem not highly relevant for the IMF. The LOI of the arrangements signed by Colombia included not only crucial and important structural reforms (needed to comply with the macroeconomic goals), but also measures added by the government, belonging to their own policies and priorities. The three arrangements were concluded as precautionary, which matters for the outcomes of the periodical evaluations. Prior actions were the most accomplished; almost 70% of them were completed (with delay) and one was partially attained. Structural benchmarks were the most numerous with a very low level of accomplishment; the measures completed or partially attained did not reach 30%. Performance criteria, which are the crucial measures for the macroeconomic adjustment, were characterized by a high degree of non-compliance. Of eight performance criteria, only one was met and three partially attained. Finally, only one condition for the completion of a program review was included in the first Stand-By arrangement and it was not met, not even during the second Stand-By arrangement when it received a waiver by the IMF and it changed again into a performance criterion.

Considering the compliance with each of the three arrangements, during the EFF only prior actions registered a satisfying level of compliance; structural benchmarks and performance criteria reported a very low accomplishment: only one structural benchmark was totally met. In the first Stand-By arrangement, prior actions were not included and structural benchmarks and performance criteria did not report a better realization; only one performance criterion was met. It included a condition for the completion of the final

review, and it was not met. The last Stand-By arrangement registered the highest level of compliance because it met the unique prior action, the two structural benchmarks and the two performance criteria. This program was the least necessary because it only supported the Colombian economy to return to normal relations with the IMF. It registered the best results from a macroeconomic point of view and apparently the structural reform scheme lost its relevance. In all the periodical evaluations performed over the six years, the completion of these periodical country reviews was recommended, despite that some structural benchmarks were not achieved. Despite this low level of compliance with structural reforms, periodical evaluations performed over the six years always recommended the completion of the programs. All the waivers requested for the non achievement of some goals were conceded by the IMF staff. Macroeconomic performance and fiscal stability were relevant in all the periodical evaluations. Some reforms were enacted although not under the scheme agreed with the IMF, which may reflect the agenda of the government. Additional measures were not counted because they varied from one report to another, and they were not evaluated by the IMF.

The growing importance of public revenue is notorious, although concrete measures were not explicit, except for the Public Revenue Commission, because they were not considered as structural reforms but as fiscal policies. For social sectors as health, pensions and unemployment, there was concern about their financial viability. Budget management predominated in the IMF analysis, which focused on the control of the fiscal deficit and the design and implementation of the budget code. Once the enactment of the budget code received a waiver upon its non-compliance, measures seeking to control revenue earmarking were the focus. Although during the arrangements the need for definitive legal reforms was highlighted, the IMF accepted that the goals were reached by simple administrative measures. The financial sector was less emphasized; mainly privatizations and supervision issues were evaluated. The reason may be that the major crisis and restructuration occurred just before the beginning of the first arrangement (1998-99). The effective implementation of structural measures recommended by the IMF was observed by the screening process of all legislative measures enacted in the relevant sectors in the analyzed period. However, they show rather the willingness of national powers to advance with their own program than the pressure from the IMF to follow its structural conditions. The major legislative work was done in 2003 (21%) followed by 2002 (16%). This peak coincided with the first year of a new political cycle after the 2002 presidential elections. The least productive years, excluding 1999 because the first arrangement was only signed in December, were 2004 and 2006. They were the last years of the Stand-by arrangements, curiously the

more precautionary and the one that reported the best level of compliance. The most represented sector was budget management (33%), followed by fiscal revenue (22%). The restructuring of the financial system and the intervention in the private sector were the least represented.

In Colombia, structural adjustment arrangements were not used as a source of obligations by the legislative or by the government. According to the IMF, only performance criteria are relevant monitoring tools for macroeconomic adjustment. Taking this assumption into account, only reforms referring to pensions, the budget code and the control of the fiscal deficit were crucial for the program. Therefore, other measures can be classified as unnecessary measures for the adjustment, although important for the government. The case of Colombia in the period 2000-6 seems to confirm the hypothesis that a country's willingness to reform is crucial for the accomplishment and that the conditions are the result of a bargaining process between the government and the IMF. Governmental agendas are in effect as important as IMF policies and conditionality for the success of the program, because the reforms could be implemented even without the arrangements.

7.3 Interaction between constitutional case law and IMF arrangements

The third specific objective of the thesis was the analysis of how the Constitutional Court ruled on structural reforms with high economic complexity: (i) the legal reasoning of the Court in the adjudication of structural reforms; (ii) the scope given by constitutional case law to structural conditions of IMF arrangements; (iii) the relevance of constitutional case law protecting ESC rights for the compliance of structural conditionality; (iv) the degree of complementarity (or dysfunctionality) of constitutional case law, IMF arrangements and development. The questions were:

- How was the legal reasoning employed by the Court to adjudicate on structural reforms undertaken in the framework of the IMF arrangements? Has the Court the capacity to rule on “complex economic issues”? Does it consider the potential economic consequences as relevant? Is it possible to measure the distorting effects of constitutional case law on the goals of the arrangements?

The analysis of adjudication in developing countries relates to the institutional capacity of the judiciary and the realization of the rule of law that limits discretionary competences of public authorities and promotes development. Some measures are recommended for developing countries to reduce incompetence and

corruption: good rules should be privileged because it is cheaper than to have good institutions, provided the lack of academic background of the civil service and the judiciary. Judicial discretion should be limited, privileging rules over standards, or general principles “which require subtle reasoning to arrive at a decision”. The aim is to obtain better performance in adjudication as well as better control (Posner 2004c; Cooter and Schäfer 2004). This is complemented by another study that concluded that judicial adjudication that takes into account social policies and promotes redistributive policies, does not necessarily improve the situation of poorer citizens. An instrumentalist judiciary may be more dangerous than a judiciary that applies the law mechanically, because when the judiciary tries to respond to social needs, it may become “charismatic”. Judges are supposed to harmonize competing social and governmental interests and to promote democracy, although they do not have special capacities to change the rules. The use of citations is a way to maintain power, because when textual restrictions disappear, they may use their personal views of social needs and take positions in political, economic and social questions. This is more frequent in developing countries where they tend to adopt “ideal” norms, impossible to obey but easy to promote by constitutional adjudication (Miller 2000).

This perspective is criticized because other rights than security and property rights are excluded, and these other rights “explain a significant amount of variations in human development indices across countries” (Bardhan 2005). Judicial activism is not necessarily more dangerous in developing democracies; in fact, Colombia is quoted as a case where judicial activism attracted lawyers educated under “the progressive Warren Court” that would “provide better democratic outputs” because a pragmatic and flexible approach is better than a “formal approach to interpreting constitutional guarantees” (Schor 2008b).

The screening of the Colombian constitutional case law per sector and per year, during the period of the IMF arrangements, reflects rather than the activity of the Court, the activity of litigants through the challenges to the reforms. This issue should be analyzed more in detail to reach relevant conclusions on the influence of interest groups in constitutional adjudications. Some preliminary results were presented in chapter four, but they were not developed further because they exceeded the purposes of this thesis. However it is relevant to highlight that the most dynamic sector was fiscal revenue (26%), followed by budget management (22%) and the lowest levels were in the intervention in the private sector (4%) and in the restructuring of the financial system (5%) which coincides with the volume of statutes. Rulings referring to the modernization of the state were highly representative in 2004 after a massive reduction of public

employment in 2003. Rulings on pensions were notable in 2004 (52%) after the reform of the second generation pension regime. The health sector was the most challenged in 2002, followed by 2003, which coincides with the reform of intergovernmental transfers (SGP). A comparative evaluation of the activity of the Congress and the Constitutional Court showed that the most productive year in terms of challenges was 2004 (26%) followed by 2003(19%) which coincides with the most productive legislative years. The least productive were 2000 (6%) followed by 2005 (8%). The highest scores of challenges correspond to the two years following the enactment of a controversial statute, but in some cases the controversy remains and challenges continue to be presented. The less productive years (2005-6) in both the legislative and the judiciary coincided with the term of the second stand-by arrangement which was the most precautionary of the three IMF arrangements, but with the highest level of compliance registered by the IMF. This reinforces the hypothesis that structural reforms were in line with the country's political agenda.

Considering the patterns in constitutional adjudication on reforms enacted in sectors defined as priority by the IMF arrangements, neutral decisions were the majority (38%). Pensions presented the highest number of neutral decisions (47%) and interventions in the private sector the lowest (30%). Rulings of constitutionality follow in importance (36%). The reform of the financial system had the highest percentage (42%) and pensions the lowest (25%). Rulings conditioning the constitutionality represented (9%) of the total number of rulings; the distribution among the sectors is more or less similar being the lowest the restructuring of the financial sector (6%). Rulings striking down a reform amounted to (17%) of the total number of adjudications. In the intervention in the private sector, they reported the highest percentage (22%), together with budgetary management (21%); whereas, transparency of the public sector reported the lowest score: (12%). Case law that struck down statutes or that conditioned its constitutionality may be an indicator of Court activism. They may also be considered as distorting the economic reforms adopted under the IMF Arrangements, because they may modify and/or limit the scope of these reforms. They represented 26% of the total number of rulings, thus clearly not the majority. However, they do not allow concluding that the Court was highly activist; further analysis is necessary to identify whether the Court accepted a normative scope of the IMF Arrangements, and whether the protection of ESC rights or constitutional principles were the main bases of these rulings.

A further sectoral analysis organized the arguments according to the articles of the P.C. used by actionists as a basis of the challenge and by the Court as a basis of the ruling (considered as being violated by the

structural reform). This procedure showed the patterns in argumentation of the Court and the challenges in each sector, and the relation between the two, i.e. the rate of acceptance of actionist arguments. Articles used in challenges were much more numerous than those accepted by the Court as violated. In some sectors (pensions), the articles used by the actionist do not correspond to those used by the Court. This may be another indication of judicial activism, even more if they were not used by the interveners neither. The use of the articles referring to fundamental rights by both is highly remarkable. The most used were the first and second generations of rights, particularly in fiscal revenue and budget management, followed by pensions. The second most used articles by both related to procedural reasons (violation of the legislative or executive procedure). They were more frequent in budgetary management and fiscal revenue. These rulings taken for procedural reasons may indicate the (weak) institutional quality of regulators in Colombia because failing reforms can also be due to failures in the legislative process. But this variable may also indicate the reluctance of the Court to analyze certain complex topics, for which in-depth analysis is necessary to further explain the behavior of the Court. Articles referring to the economic regime and public finances came only in fourth place; actionists used more rules concerning intergovernmental transfers while the Court used more the general economic principles. This ranking clearly shows the reluctance of the Court to analyze complex matters in a specialized way, privileging decisions based on rights and general principles or procedural failures.

From the in-depth analysis, it follows that the reform of the SGP produced positive effects. A study concluded that from the perspective of macroeconomic stability, intergovernmental transfers were detached from the current revenues of the central government. This allowed that increased tax collection and better economic performance were not necessarily transferred to expenditure. The constitutional amendment to be approved in 2007 was supported even if it represented a larger transfer than the scheme supported by the IMF, because of its positive effects on fiscal savings (Lozano et al 2007). However, rulings on structural reforms in the health sector may have affected the reforms: Law 617/00 sought to control budgetary autonomy of territorial entities due to their high fiscal deficit and indebtedness. Non-neutral rulings did not have much relevance, although they respected the fiscal autonomy of territorial entities, they mostly accepted the structural measures because they sought to protect the principle of macroeconomic stability. Some non-neutral rulings on Law 715/01 protected the participation of the private sector in the provision of health services by striking down some controls and regulations established by the government. Other rulings struck down the delegation of legislative competences to “organize a system of inspection, control

and surveillance” to manage the SGP, as advised by the IMF. And finally, other referred to the amount of transfers of the SGP. One accepted the embargo of these rents to pay debts related with the service, and another rejected the reform of the appropriation allocated to SGP in the annual budget law to help reduce the fiscal deficit. However, in general constitutional rulings did not disturb much the fiscal adjustment.

In the health sector also, the IMF stressed the need to diminish public expenditure allocated to health through the progressive reduction of the SGP and through the progressive privatization of health services. Structural conditions and legal reforms did not promote a systematic reform of the service to gradually improve the quality and coverage of the health sector. The reason may be that it does not correspond to the traditional competences of the IMF. The Court in turn, focused on health-related problems of individual citizens (the ‘service deficit’), using for this purpose the APFR case law. Despite the structural reforms, the fiscal sustainability was still problematic because almost 55% of the costs were covered by the government and not by the contributory system or the selling of services. The level of public expenditure in health was already high and therefore difficult to increase. The payroll tax, increased by Law 1122/07 (outside the IMF arrangements), seemed insufficient to cover the needs of the system and affected the labor market (Clavijo and Torrente 2008). The high potential distortionary effect of APFR case law for the budgetary equilibrium of the sector and for the public finances as a whole was not mentioned in the Structural Agreements, whose focus was on the restructuring of the sector (through the reduction of labor rights) and even these short term aims were not necessarily met. Some studies concluded that budgetary restrictions were also due to the bad implementation of legal reforms and the non-accomplishment of legal parameters by some actors (public hospitals and people obliged to contribute to the system). Corruption has also played a relevant role, not mentioned in the periodical evaluations. Therefore, the main reason to limit the service was not the lack of resources (Lozano and Rincón 2007). Health care coverage increased mostly because the growth of the population covered by subsidies was higher than the growth of the contributory regime, creating incentives for the growing informality in the labor market (Clavijo 2009).

It is not clear whether rulings referring to the restructuring of health services provided by the ISS had an impact on IMF structural conditions because, apparently, the Court changed the doctrine presented in C579/96, attacked by the IMF, to defend the arguments of the government. But, by conditioning the constitutionality of the statute, it protected labor rights, and despite the different legal conclusion, the economic consequences of C579/96 remained. This was not analyzed by the IMF. The government

justified the restructuring of the ISS (CONPES document 3219/03), claiming that structural problems of ISS were aggravated by two rulings of the Court: (i) C 579/96 which increased the number of workers with the right to collective bargain benefits (from 2.000 to 24.000); (ii) SU480/97 which ordered the ISS to contribute to the solidarity account of FOSYGA since 1997 (before, only private EPS complied with this duty). These rulings, together with other financial and administrative problems, forced CONPES to conclude the non-viability of the ISS. Then, CONPES document 3456/07 analyzed the situation after the reform: the structural deficit continued, mainly because of the pension charges and the operational deficit, i.e. the purposes of the reform were not met. Although the Court rulings apparently supported the norm and changed its case law of 1996, the labor cost pressure did not change or was even aggravated, because the rulings probably maintained the effects of C579/96. Constitutional doctrine was not relevant for the government because despite the extended debate on the legal nature of the labor contracts of the ISS after its division, CONPES assumed that they conserved the category that they had before the structural reform of 2003.

The restructuring of the state sought its downsizing by staff cuttings, privatizations of public utilities and commercial activities. Rulings analyzing the downsizing of the state and privatizations were not mentioned because they were in line with IMF purposes. Only one ruling produced before the arrangements (referring to Law 489/98), was quoted as a bad intervention of the Court. In contrast, the IMF had a negative opinion on Court rulings on wages and made them responsible of some fiscal distortions in the program. Once the economic stability was highlighted (since 2005) the distortionary role of the Court almost disappeared. Economic criticisms of the case law on wage indexation were also based on a “universal principle” that wages should be adjusted according to “the evaluation of the inflation and the productivity” to respect the principle of equity (Clavijo 2001c). But this principle is not necessarily universal and neither controversial because there is no clear consensus about the economically correct formula of wage increases (Pérez 2003). Critics also referred to the Court for ignoring the high public deficit. These criticisms were shared by the IMF who nuanced this right to support fiscal adjustment. Although the expected budgetary consequences of Court rulings were seen as catastrophic (more indebtedness, cuts in investment programs and social expenditure), the freezing of public wages was not as crucial for the accomplishment of the fiscal goals of the adjustment: the monetary policy reached an inflation rate one point below the one forecasted for 2000. Some members of the Board of Directors of the Central Bank, among the critics of the measure, recognized a positive macroeconomic effect of the rulings: they would increase the demand and would help the economic reactivation and would produce a higher income for the state.

Non-neutral rulings referring to wage indexation were the focus of the criticisms of the IMF: C815/99 was ruled before the beginning of the IMF arrangements, but the IMF considered it as a reversal in the efforts to limit the incidence of the backward-looking wage indexation, accused of increasing substantially public expenditures and being a “clear case of fiscal irresponsibility” although highly defended by workers. It was complemented by C481/99 which established that the accomplishment of the monetary, exchange rate and credit policies by the Central Bank are subject to the constitutional principles and the effectiveness of the Legal Social State, including the progressive application of ESC rights. In 2003, the IMF signaled again that the reform (flexibilization) of the labor market did not solve the negative effects of this ruling on the budget. C1433/00 ordered a generalized indexation of public wages after the government froze public wage as a way to control the fiscal deficit. This ruling was accused of obstructing the macroeconomic goals of the structural adjustment. The IMF expressed its fear that the Court would extend this ruling to the private sector. However C1549/00 did not do this because it rejected the challenge as being an absolute legislative omission that the Court could not fill.

Since 2001, rulings on the indexation of public wages mostly defended the policies of the government and limited the right to wage indexation and in practice, they did not produce the catastrophic consequences attributed to them in the IMF C.R. However, constitutional case law seems to have interfered with public wage policy, rejecting statutes in force and substituting the Congress as regulator. The analysis of wage indexation is complex because the annual decrees cover exclusively the basic wage, and not hierarchies or levels (and grades), representation expenses and premiums. When only looking at the decrees (as the Court did) a deterioration of public wages compared to inflation rates is observable, but when all the factors are included, the tendency is similar to the one shown by real wages of the private sector. A study showed that the main mechanism used to increase public salaries is promotion, which did not count as a wage increase (Arango and Posada 2006). This “wage leveling” contrasts with the public policy of austerity. Congressmen, justices of high courts, the Public Ministry, the Prosecutor, the Ombudsman, the Registrar, the ministries and the high military are among the employees who benefited from this “leveling” (Perez and Cordoba 2003). The Court protected the right of these high employees in 2003, arguing the violation of ILO Convention 100 (3) and the constitutional principles of equality. These rights were considered as “constitutional regulations” that recognized, in the case of Congressman, “their exclusive dedication to

political representation with a severe regime of incompatibilities”. This ruling contrasted with other rulings that limited public wages because of fiscal constraints.

Other sectors also benefited from the wage leveling as the educational and health staff but they belong to the SGP instead of the national budget. The “wage leveling” had a political motivation, not necessarily the realization of the Legal Social State, and together with the rising military expenditure it increased the budgetary deficit more than wage indexation (Perez and Cordoba 2003). As Kaufman (2000) highlighted, the IMF explicitly excluded military expenditure from the conditions of the arrangements, which allows a high level of discretion in budgetary adjustments. In the case of Colombia, public expenditure related with the peace process was also excluded (cf. EFF).

Other relevant rulings, mentioned by the IMF as perturbing the macroeconomic goals of the arrangements, as modifying a “crucial” structural reform for the adjustment program, were (i) C776/03 that struck down the enlargement of VAT to essential consumption goods. The Court argued the violation of the tax principles of progressiveness and equity, which protect the Legal Social State. (ii) C1056/03 struck down part of the pension reform for procedural reasons. The ruling was accused of increasing the actuarial deficit of the pensions by 17% of GDP, but the failure was corrected by Law 860/03 and the distortionary effects did not continue, although the IMF continued to refer to this ruling.

The lack of institutional capacity to understand complex economic regulations is evident and the Court used (or abused) discretionary competences to rule on economic issues mainly supported by arguments based on rights and general principles or procedural failures. The complex issues were therefore not analyzed and sometimes rulings protecting rights produced effects contrary to their arguments. However, in general, case law did not go against the general recommendations of the IMF. On the contrary, most of them defended the policies of decentralization and the freedom of enterprise in the provision of health services, although the IMF structural conditions did not have a strong normative character. APFR case law influenced the IMF supported programs because of its effects on budget management, but its consequences were not analyzed by the IMF or by the government. The trend in APFR case law on health issues, with consequences for macroeconomic policies, is not exclusive of the Constitutional Court. The Council of State has also ruled against the arguments of the government, based on the preeminence of the

principle of macroeconomic coherence, when it protected the collective right of “access to the public health service”.

- How coherent are the periodical evaluations of the IMF? How was the particular evaluation of the role of constitutional case law in the accomplishment of the goals of the arrangements? What is the role of the government?

Many studies address the political bias of the (orthodox) economic advice of the IMF. It has been shown that IMF conditions may be influenced by elections, because new governments are more willing to support unpopular measures in the IMF arrangements. Therefore, they are larger after elections and not interrupted before elections to avoid consequences for the governments but also not to affect the perception of IMF programs (Dreher and Vaubel 2004; Dreher 2003). Some evidence was found that elections do not only negatively affect compliance (especially in the electoral period) but that the IMF shows a capacity to handle electoral periods in flexible ways. Also that program incompliance tends to increase in pre-electoral periods, particularly in less democratic countries. Sometimes the IMF has entered in arrangements just before elections or it has not interrupted programs in spite of non-compliance on other occasions (Dreher 2003).

Political proximity with respect to the US has also been reported as a positive factor in the relation with the IMF (Dreher, Sturm and Vreeland (2006)). This study found that temporary UNSC membership seems to be positively related with participation in IMF programs and negatively with the number of conditions in the LOI. In addition, Dreher, Marchesi and Vreeland (2008) showed that voting behavior in the UNSC in line with the US position would explain a positive bias in IMF forecasts of growth and inflation for recipient countries, especially in pre-electoral periods. These effects should be seen in combination with other effects. For the purposes of this point, this issue seems also to be confirmed in the case of Colombia. In the period of the arrangements, the good relations of Colombia with the US government were the constant (cf. Plan Colombia). But also Colombia was member of the UNSC when it occupied the presidency in two occasions, clearly supporting the international position of the US.

The internal conflict and elections were relevant for the IMF in evaluating the accomplishment of structural reforms in Colombia. In some cases the IMF expressed its “sympathy” (or rejection) for the government in power, e.g. the last evaluation of the EFF arrangement highlighted the lack of efforts of the government (led

by President Pastrana) to comply with the arrangement, despite the former positive periodical evaluations published by the IMF staff. In contrast, opinions on the government of president Uribe were in general positive despite the equally low level of accomplishment in structural reforms, but not in macroeconomic goals. The IMF even supported the constitutional amendment to allow his re-election. But in general, political uncertainty was a constant; the elections were a clear distortion of the structural reform agenda, although the IMF did not change their evaluations; in effect, it was flexible in its evaluations.

This analysis identified patterns in the risks signaled by the IMF in the periodical program reviews. The civil conflict was present in almost all program reviews, although with variable intensity. In the last reviews the IMF was more optimistic. International risks (increase of interest rates, currency depreciation, oil prices) appeared since 2003 and remained as such. Court activism (understood by the IMF as the reversal of economic reforms) was mentioned only once in 2004, maybe because of the political sensitivity of the Referendum. Only once the IMF considered that the (“sometimes overturned”) revision of economic reforms by courts was positive for building institutional confidence towards the state (CR 99/149:24). Afterwards, the activism of the Court (used as synonym of reversal of economic reforms) was negatively appreciated. The final report (CR 06/408) of the executive Director of Colombia at the IMF mentioned the high level of compliance of the country, despite that in some occasions neither the Court nor the Congress supported the program.

Macro-economic performance was the most relevant issue of the periodical C.R. Concerning structural conditionality, in all the periodical revisions the IMF recommended the completion of the program despite of the low level of compliance; all the waivers for non-achievement were conceded. Structural conditions were not the object of a detailed follow-up of the concrete commitments. From the periodical analysis of the IMF, it seems clear that the oil boom played a determinant role in the good macroeconomic results, because as the IMF recognized, Ecopetrol is the main contributor to the national budget. The situation was similar to the one of the eighties when the coffee boom played a central role in the completion of the adjustment asked by the IMF (Garay 1991). Despite the fact that oil resources contributed significantly to the realization of the macroeconomic goals, the reforms of the non-renewable resources sector were not mentioned by the IMF, except for the restructuring (partial privatization) of Ecopetrol, and the elimination of fuel subsidies,

The restructuring was performed basically through privatizations mainly in the public utilities and mining sectors, where the violence impacted most, retarding clearly the scheme of privatizations. The privatization of the bank sector was monitored under the financial sector. This sector received also permanent support from the IMF.

The government used constitutional case law on the structural reforms for its convenience, depending on which international institution, the IMF or the ICESCR, it had to report to. It used some judicial review rulings as an excuse for the non-realization of macroeconomic goals of the IMF arrangements but it used the same rulings as a proof of compliance with the ICESCR duties. Ironically, the IMF recognized that conditionality should be compatible with the competences of national powers, and be coordinated with the actions of other Multilateral Organisms.

The intervention of the government in the constitutional judicial review analysis of structural reforms was coherent and uniform, defending the need of the adjustment (without mentioning expressly the deadlines of the IMF arrangements scheme). It was mainly based on legislative antecedents identified with the legislative purpose (the protection of the macroeconomic stability) because of the risk of “a bigger fiscal deficit whose control is a goal to avoid macroeconomic crisis and risks of defaults”. The financial sustainability of the system was presented as an “objective and reasonable justification” supported by constitutional case law. CONPES documents were presented as sufficient proof of the fiscal situation, accepted by the Court by way of arguments of congruence (policy). These documents also demonstrated to the IMF the compliance with specific goals of structural conditions.

The inclusion of its political agenda in the arrangements was more than notorious. In the first arrangement it included many measures that were already enacted or that were in the Congress, thus clearly not imposed by the IMF. The agenda of the periodical structural benchmarks varied in function of the improvements in the legislative agenda, and they were reported by the IMF as compliances. The lack of a detailed follow-up of concrete commitments of structural reforms was remarkable and complicated the evaluation from a legal perspective. Its normative (binding) character was not clear at the national level (including the judiciary) because national authorities may ignore measures proposed by the IMF conditionality. This confirms their character as soft law. A better coordination among national powers in the

negotiations of the arrangement would have been convenient (IMF, 2001).

The Court was not the only institution showing failures. The proposition of a better quality control of statutes performed by the Congress and the executive would make the enforcement of public policies more efficient and expedite, thus eliminating potential incentives to challenge laws (Amaya 2001). This contrasts with the opinion of some experts of the IMF and the World Bank (Saez 2003), accusing the Court of being highly activist, producing “highly controversial decisions”. Economic analyses are not always rigorous neither and may also present personal views as “universal principles”. The IMF did not present a rigorous analysis of institutional problems or of the potential disturbing role of the Court neither. All actors lacked a clear and rigorous methodology in their work that obstructed the comprehension of their positions, the transparency of their actions, and the compliance with their legal competences.

- Do the IMF and the Constitutional Court influence distributive policies, rights protection and development?

Economic development, economic liberalization and the respect for human rights are related to the design of structural adjustments programs because ESC rights may suffer restrictions during their implementation, with the expectation of being reestablished in the long term (Rodwan Abouharb and Cingranelli 2006). The “Tilburg Guideline Principles” sought to define the human rights duties of International Financial Institutions (IFI), mainly emphasizing that macroeconomic and financial issues cannot be isolated from economic, structural and human aspects of development and therefore, the countries cannot accept arrangements that obstruct the compliance with international human rights law. The legal obligations of IFIs are deduced from the current definition of development, which includes the respect for human rights. The monitoring and staff training on international human rights law were proposed as a way to comply with these duties. The IMF was also required to reform the accountability mechanisms to allow a “settlement of complaints” presented by affected groups of persons by IMF programs and policies (Tilburg Guideline Principles 2003). In the particular case of International Labor Standards, both the World Bank and the IMF explicitly recognized their rules and accepted the scope put forward by the ILO. However, the protection of labor rights is also subordinated to the concept of flexibility in the development of markets (Rittich 2006). IFIs do not completely share the “rights-based approach to development”. They defend the right to trade, as a

basic human right and therefore the inclusion of rights in the arrangements with IFIs is not totally accepted (Rittich 2006).

A study on the relation between the IMF and World Bank structural arrangements and the respect of fundamental rights, found that developing countries show an inversely proportional relation between length of structural arrangements and respect for fundamental rights by governments. In addition, the conditionality of those arrangements appears as negatively affecting duties of fulfillment of ESC rights by governments in developing countries. The “Millennium Development goals” are relevant for the compliance with adjustment programs because the latter have been seen as responsible for poverty increases. Defenders of structural adjustment criticized this analysis by arguing that not all the countries implemented the policies of IFIs, that the situation of those countries was bad enough before entering into the arrangements and that the governments are responsible for the implementation of poverty-reducing policies. However, the analysis explained the procedure followed to avoid these biases. They also found that democratic countries with larger populations have higher possibilities to conclude a Structural Adjustment Arrangement, which shows a political bias because of their relevance at the international level (Abouharb and Cingranelli 2007).

Analyses of the effects of the Structural Adjustment Arrangements found that they deteriorate workers rights. Labor market reforms, privatizations and civil service reforms “undermined the position of workers” because of the labor market flexibility and privatization without regulation (SAPRIN 2004 quoted by Abouharb and Cingranelli 2007). The World Bank is less involved because, since 2006, it is bound to “respect the core labor standards established by ILO”. Therefore, the World Bank financed more projects in countries with a relatively high level of protection of labor rights whereas the IMF showed an opposite trend. The World Development Report of 2006 “Equity and Development” highlighted this respect of core labor standards as crucial to achieve equitable growth and development. In contrast, in the Report Doing Business of 2006-7, the criterion of “friendliness to business” used to classify the states, included the flexibilization of labor markets, i.e. countries enforcing labor rights were sanctioned. Neither the OECD nor the IMF use the respect for labor rights as a condition to succeed in trade and investment (Abouharb and Cingranelli 2007). However, further analysis of these issues goes beyond the purposes of this thesis.

Taking into consideration the concrete issue of this thesis, it was found that structural adjustment programs affect labor rights by reducing (i) the role of the state in the economy, i.e. less regulation of labor markets; (ii) public expenditure (less subsidies, staff cuttings, wages freeze and reduction of labor benefits); and (iii) the right to collective bargains and the freedom of association. In addition, some analyses found that international trade negatively affects labor rights whereas foreign investment improved them (Abouharb and Cingranelli 2007). The worldwide recognition of ESC rights is seen as a threat to decisions of investment because higher taxes to finance them are a barrier for foreign investments. Simultaneously, international institutions support ESC rights enforcement because they are supposed to increase productivity (Tushnet 2008c; Mohr 2007).

On the basis of the analysis of the Colombian case, it is clear that it also illustrates the tensions between policies to promote the right to development and the protection of ESC rights, on the one hand, and the economic policies and structural reforms suggested by the IMF, seeking macro-economic stability and growth, on the other. It is still early to establish strong conclusions about the developmental impact of the IMF programs but a few observations can already be made: First, although there are probably no indications that, generally speaking, the protection of ESC rights in Colombia has worsened in the period under the IMF agreements, it is the case that during the period under consideration the behavior of the Court has been aligned more with the objectives of the programs; in addition, macro-economic restrictions were more often recognized as valid reasons to limit the scope of constitutional rights, particularly labor rights (staff cuts, wage freezes, flexibilization of the labor market and limitation to the right to association and to present collective bargains). There are indications that the justiciability of ESC rights was to some extent limited by the Court.

Second, when looking at different development indicators during that period it is obviously difficult to separate the effects of the IMF-supported reforms and Court adjudications from other effects (international economic situation, internal political context, policies outside the IMF framework etc.). What the indicators seem to show is: (i) that relatively positive macro-economic figures seem to go hand-in-hand with relative losses in the HDI ranking of Colombia during the adjustment period; (ii) that the flexibilization of labor laws seems to go hand-in-hand with lower unemployment; (iii) that the adjustment program apparently kept gini coefficients high; and (iv) that the period of adjustment coincided with the strengthening of (democratic) public institutions.

8 References

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